IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

LA ABRA SILVER MINING COMPANY,
APPELLANT,
vs.
THE UNITED STATES,
APPELLEE.
No. 189.

ON APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON THE QUESTION OF THE VALIDITY OF THE APPROVAL OF THE ACT APPROVED DECEMBER 28, 1892.

The question presented in this brief is, whether, under the provisions of Section 7, Article I, of the Constitution, the President may approve a bill after the adjournment of Congress, such adjournment having taken place under the provisions of the last clause of Section 5 of Article I, to wit, by concurrent resolution of both Houses.

It appears that the bill in question was approved December 28, 1892. It further appears that Congress, on

the 22d day of December, 1892, adjourned until January 4, 1893, in pursuance of the following resolution:

"*Resolved by the House of Representatives (the Senate concurring)*, That when the two Houses adjourn on Thursday, December 22, they will stand adjourned until Wednesday, January 4, 1893."

The language of the Constitution is:

"Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve, he shall sign it, but if not he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their Journal and proceed to reconsider it. * * * If any bill shall not be returned by the President within ten days, (Sundays excepted), after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress, by their adjournment, prevent its return, *in which case it shall not be a law.*" (Section 7, Article I, Clause 2.)

ADJOURNMENT.

The Constitution makes the following provisions on the subject of adjournment:

"Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting." (Section 5, Article I, Clause 4.)

The 3d clause of the 7th section of Article I provides that every order, etc., to which the concurrence of the Senate and House of Representatives may be necessary, *except on a question of adjournment*, shall be presented to

the President of the United States, etc. And the 3d section of Article 2 provides that in case of disagreement between them (the two Houses of Congress) with respect to the time of adjournment, he (the President) may adjourn them to such time as he shall think proper.

These are the constitutional provisions with respect to adjournment.

We contend that no power exists on the part of the Executive to approve a bill after the adjournment of the two Houses of Congress; and we further contend that the adjournment mentioned in the Constitution is an adjournment by concurrent resolution, to wit, an adjournment of Congress, *i. e.*, both Houses, and it is immaterial whether it be for ten days or ten months, so long as it is an adjournment upon which the Constitution requires the action of *both Houses*, or that of the President in case of their disagreement, in order to make it effective.

FIRST.

The approval by the Executive of a bill passed by the two Houses of Congress is a legislative function. In approving bills the Executive does not perform an executive but a legislative act. The President in signing bills actively participates in legislation; as such he is a branch of the legislature. He is a component part of the law-making power. In order to make a law under the Constitution the Senate, the House, and the President must concur.

And this view has been generally, if not universally, taken by writers on our public law. Judge Pomeroy says the President legislates; his approval or disapproval of proposed legislation is a process of creating, not of executing laws. By virtue of the various provisions of the

Constitution the Congress is, in fact, though not formally in terms, composed of three distinct bodies, the President, the Senate, and the House of Representatives, and all must concur * * * in order to make a law.

Pomeroy's Const. Law, Sec. 174–175.
Kilbourne *v.* Thompson, 103 U. S. 168.
Cooley's Con. Lim., Marg. of p. 153.
Fowler *v.* Pierce, 2 Cal. 167.
Hardee *v.* Gibbs, 50 Miss. 803.
The Federalist, No. 47.
Blackstone's Commentaries, 184–185.
Anson, Laws and Customs of the Const., 284–287.
State *v.* Mounts, 36 W. Va. 186.
Annals of Congress, Vol. I, p. 463.

The President's power in disapproving bills is not simply revisory; it does not merely refer them back for further consideration. He gives or withholds his approval, without which the act is inchoate. That is a function of legislation, and though his veto (I forbid) is less potential than was that of the King of England, the quality is precisely the same. While the veto of the King ended the proposed legislation, the veto of the President requires the concurrence of two-thirds of each of the Houses of Congress to overcome it.

People *v.* Bowen, 30 Barb. 24; same case, 21 N. Y. 517.

If it is true that the President acts as a part of the legislature in his approval or disapproval of proposed legislation, it seems to us that it follows conclusively that he must act during the time that the legislature is in session, and we cannot see either upon principle or authority how it can be contended that the President's action on proposed legislation can be otherwise than a

legislative act. It certainly is not executive. He is not dealing with the execution of the law, for there is nothing to execute. He is dealing entirely with what may or may not be the law in the future. Nor does the case of Seven Hickory *v.* Ellery, 103 U. S. 423, militate against this view. That decision was based upon entirely different language from that contained in our Constitution.

SECOND.

By the spirit, as well as the letter of the Constitution, the President should have the right to veto as well as the right to approve, and when deprived of one the other fails. The Constitution does not mean that the President must sign the bill within ten days if Congress remains in session, but if it adjourns he can sign it whenever he likes.

Such a construction would have to be given to the Constitution in order to sanction the approval of a bill after Congressional adjournment.

The ten-day clause is a limitation of the time within which the President must act during the session, and it is illogical to say that the Congress can extend that time indefinitely by adjournment. The language of the Constitution seems to put it beyond doubt that if Congress, by its adjournment, prevent the return of a bill it shall not be a law. If the last nine words, to wit, "in which case it shall not be a law," were omitted, it would be much easier to give the construction contended for by the Government; but they were put there for some purpose.

"In which case," that is, in case of the adjournment of Congress, "it shall not be a law," whether the President signs it or not. It does not say it shall be a law if the President signs it, but it says it shall *not be a law*, without any qualification. Presidential approval cannot aid

it, because he is no longer a part of the legislature. The legislature is not in session and his signature at such a time is a mere personal act, not a legislative one. The spirit and intent of the Constitution was to give the President a chance to consider and to exercise his judgment as to the *approval* or *disapproval* of a bill which passed Congress. When Congress takes away from him the right to *disapprove* he is not bound to examine the bill at all, nor did the Constitution intend that he should. *It operates as a withdrawal by Congress of the proposed legislation.* Nor can it be claimed that during a short adjournment the President might return a bill with his objections and deliver it to an officer of either House. There is no sanction in the Constitution for any such thing as that. In fact, it is very clear from the language of the Constitution that such a thing could not be done, because if the President could return a bill to an officer of the House, and its delivery to such officer would be a sufficient return, the clause in the Constitution with respect of an adjournment of Congress preventing its return would be utterly futile; for if it could be returned to an officer of the House, an adjournment of Congress could never prevent its return. There is always an officer of the House, and hence that clause of the Constitution would be meaningless.

THIRD.

Our entire history shows that from the beginning of our Government, it has always been considered necessary that every step connected with the enactment and approval of a law should be taken before the adjournment of Congress. The historical precedents upon this subject are collated in an article by Mr. Renick published in the 32d

American Law Review, page 208. It appears that the first time this question was raised—that is, the power of the President to approve an act after Congressional adjournment—occurred during President Monroe's administration in 1824, when it appeared that some forty or fifty bills were submitted to him on the last day of the session, and one of these he had inadvertently failed to sign. On the opinion of his cabinet, Wirt being Attorney-General, it was decided that he had no power to sign it.

8th Memoirs of J. Q. Adams, 104.

6th Memoirs of J. Q. Adams, 379, 381.

7th Memoirs of J. Q. Adams, 233–234.

Thus the rule obtained from the foundation of the Government up to the present time, with the single exception of the Captured and Abandoned Property Act approved on the 12th of March, 1863. The House of Representatives having been apprised that the bill in that case had been approved after the adjournment of Congress, ordered its Judiciary Committee to inquire and report whether said act was in force, and the House Judiciary Committee, on the 11th of June, 1864, reported to the House of Representatives that the act referred to is not in force, and in that conclusion the Committee were unanimous. The report of the Committee is inserted here as matter of argument.

APPROVAL OF THE ACT OF MARCH 12, 1863.

June 11, 1864. *Referred to the Committee of Ways and Means, and ordered to be printed.*

Mr. Wilson, from the Committee on the Judiciary, made the following report:

The Committee on the Judiciary, to whom was referred the subject of the approval of the act of March 12, 1863,

report: By resolution of the House of May 16, 1864, it was ordered, "That the Committee on the Judiciary be instructed to inquire and report to the House by what warrant or authority the act entitled 'An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States,' was approved on the 12th day of March, 1863, and whether said act is in force."

On the reception of this resolution the Committee caused a note to be addressed to the Secretary of State, asking to be informed whether, as a matter of fact, it appeared on the original files in the State Department that the act referred to was approved on the 12th day of March, 1863. In reply to this note, the Secretary of State responded that the original act is to all appearances regular in every respect of form. As to the date of its approval, that of the 12th day of March, 1863, the words and figures "approved March 12, 1863," are in the handwriting of the President and followed by his signature. Thus it appears from the original files in the State Department that such act was approved March 12, 1863, and this is true in fact as to the date of the approval.

The section of the Constitution of the United States bearing upon this question reads as follows:

"If any bill shall not be returned by the President within ten days, Sundays excepted, after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless Congress by their adjournment prevent its return, in which case it shall not be a law."

The Committee are informed that in the great press of business immediately preceding the adjournment of Congress on the 4th of March, 1863, the act which is made the subject-matter of inquiry by the resolution of the House was passed to the Secretary of the Treasury for examination, as it related particularly to his department. It did not reach the President again until after the adjournment of Congress, when it was approved by him under the belief that the last clause of the section of the Constitution above quoted was designed more

especially to prevent Congress from enacting laws without the approval of the Executive, which might be done by the passage of bills by the two Houses followed by an adjournment before the President could examine and return them, were it not for the declaration that in such cases the bills shall not be laws, and did not relate to cases wherein the Executive should approve bills sent to him by Congress within ten days, even though an adjournment should occur before the return of the bills. That there is force and plausibility in this position a little reflection will discover to any mind, but the Committee cannot receive it as a correct interpretation of the Constitution.

The ten days' limitation contained in the section above quoted refers to the time during which Congress remains in session, and has no application after adjournment. Hence, if the Executive can hold a bill ten days after adjournment and then approve it, he can as well hold it ten months before approval. This would render the laws of the country too uncertain, and could not have been intended by the framers of the Constitution. The spirit of the Constitution evidently requires the performance of every act necessary to the enactment and approval of laws to be perfect before the adjournment of Congress.

The Committee therefore conclude that the act referred to, approved March 12, 1863, is not in force, and in this conclusion the Committee are unanimous.

FOURTH.

The practical construction, thus almost uniformly given, from the foundation of the Government ought to be controlling on a matter of construction.

French *v.* State, 141 Ind. 618.

Guergin *v.* McAllister, 88 Texas, 284.

Miller on the Constitution, 187.

Some stress has been laid upon the fact that the Captured and Abandoned Property Act had been before

the Supreme Court in a number of instances and property had been passed and the provisions of the act construed by this court. While this is true, it is also true that the law on its face was valid, and no question of its validity was ever raised. No one whose rights were affected by the act has ever attacked its validity before this court, so that the question was never presented to this court for consideration, and it seems to us that it is no argument to say that because the court did not go out of its way to pass upon the constitutionality of that act, that therefore its constitutionality was affirmed.

Cooper *v.* Telfair, 4th Dall. 721.
Nashville *v.* Cooper, 6th Wall. 247.
Cooley's Const. Law, 5th edition, 196–197.

But it must be observed in this connection that the act of July 2, 1864, 13th Statutes, 375, was a practical re-enactment of the act of March 12, 1863, and further, the act of March 12, 1863, was embraced in and re-enacted in the Revised Statutes in 1873, so that before any case had reached the Supreme Court involving the construction of the act of March 12, 1863, the subsequent statutes had re-enacted it, first, substantially, and second, identically, and it would have been futile in view of the act of July 2, 1864, to have raised any question as to the validity of the act of March 12, 1863, when that act first came before the Supreme Court for consideration.

We respectfully submit, therefore, that the act approved December 28 1892, granting to the Court of Claims jurisdiction to hear and determine the questions involved in this litigation, is void for the reason hereinbefore set forth.

JNO. C. FAY,
Of Counsel for Appellant.

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Brief of Kennedy, Wilson, Fay

Renick for Appellant

Supreme Court of the United States.

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LA ABRA SILVER MINING COMPANY,
Appellant,
vs.
THE UNITED STATES,
Appellee.
} No. 189.

On Appeal from the Court of Claims.

Brief on the Questions of Law, and Argument on the Facts for the Appellant.

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ERRATA.

After line 9 in the *note* on page 15, insert (*Ib., p. 66.*)

On page 25, after the third paragraph, insert:

On the 7th of July, 1886, Mr. Edmunds, for Mr. Morgan, reported a bill from the Foreign Relations Committee (S. 2208), "to amend and enlarge the 5th section of an act approved June 18, 1878." There was a minority report by Mr. Brown. (Rep. 1454 and Views of the Minority, Sen., 49th Cong., 1st Sess.) The bill authorized and directed the Attorney General—

> "to bring a suit or suits in equity, in the name of the United States, in the Supreme Court of the District of Columbia against La Abra Company, its legal representatives or assigns, to determine whether the award was obtained * * * by fraud on the part of the said * * * Company, or its witnesses, agents, attorneys or assigns, and to recover any part of said money which may have been paid by the United States on account of said award or claim to said La Abra * * * Company, or other persons claiming under it."

Full jurisdiction was to be conferred on the Supreme Court of the District "to hear and determine such suit as a suit in equity," and "to proceed in all respects according to law and the rules of practice in chancery which obtain in other equity causes." The third section granted an appeal to this court, and authorized it "to take jurisdiction thereof and decide the same." The President was authorized to release the Government of Mexico from further payment to the extent that the award should be adjudged fraudulent, and to return to said government any money that might be recovered in said suit, and also any money paid by the Government of Mexico on account of said award and remaining in the custody of the United States.

On page 32, line 25, no quotation marks.

On page 64, line 29, "1 Cr., 63" should be *1 Cr., 165, 166.*

On page 65, line 33, "13 Pet., 417," should be *13 Pet., 420.*

On page 83, 6th line, "13 How," should be *17 How., 349, 351.*

On page 83, line 28, "could" should be *would.*

On page 98, line 5, "115 U. S." should be *116 U. S.*

On page 142, 4th line from the bottom, for "Brackenridge" read *Rowan.*

On page 143, line 17, for "Brackenridge" read *Rowan.*

On page 161, line 11, "award" should be *awards.*

On page 170, line 12, "claims" should be *claim.*

SYNOPSIS.

Explanatory Note: How the different sets of testimony have been taken, and the sense in which the words "depositions" and "affidavits" are used.

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Explanatory Note.

The words "affidavits" and "depositions" are used interchangeably in describing the testimony in this case. Shortly after its organization, the United States and Mexican Claims Commission rescinded the rules it had adopted for the examination of witnesses, because, upon further consideration, the Commissioners were of opinion that the subject was outside of their jurisdiction, as under Article II of the Convention it was provided that the Commissioners should proceed to the investigation and decision of the Claims in such order and manner as they might conjointly think proper,—but upon such evidence or information only as should be furnished by or on behalf of their respective governments. (*Vide* Journal of Commission in the Department of State.)

The testimony before the Commission was taken *ex parte*, on both sides, mostly in the form of questions and answers (the Company's witnesses being sworn by some competent officer who certified to their credibility), but each side had the right to re-examine the other's witnesses, and the Mexican government exercised this right in re-examining Avalos, Del Valle, and Granger (the last-named four separate times), after they had been examined for the Company.

The witnesses for Mexico were examined under oath in the Mexican courts, mostly in the court of first instance at San Dimas, upon written interrogatories, and certified copies of these examinations were filed with the Commission. (*Record*, 106, *Note.*) Mexico's witnesses, whose testimony is comprised in "the newly-discovered evidence," were examined in the same *ex parte* way. The witnesses in the Senate investigation were sworn and examined in the usual manner, and so were the witnesses who have testified in this suit.

Congressional documents relating to the case are cited and extracts from them are given, under stipulations between the parties. (*Record*, 316,854.)

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

LA ABRA SILVER MINING COMPANY
vs.
THE UNITED STATES.
No. 189.

BRIEF FOR THE APPELLANT.

History of the Case.

The appellant, La Abra Silver Mining Company, filed its certificate of incorporation, under the laws of the State of New York, on the 21st of November, 1865, for the purpose of carrying on the business of mining and smelting argentiferous and other ores at Tayoltita, in the mineral district of San Dimas, State of Durango, United States of Mexico. (*Record*, 24.)

In the spring of 1865, David J. Garth, who afterwards became treasurer of the Company in New York, and Thomas J. Bartholow, who was its first superintendent in Mexico, visited and inspected certain mines in the vicinity of Tayoltita (*Record*, 167), which they purchased for themselves and their associates, and subsequently conveyed to the Company. (*Record*, 28.) This conveyance included the haciendas San Nicolas and Guadalupe, and the mines known as Rosario, Luz,

Cristo, Ynocentes, Arrayan, and 550 feet of the Guadalupe mine. (*Ib.*) The price paid for this property in gold was $50,000, and $7,000 for the stock and fixtures of the store. (*Record*, 67, 167.) The Company also purchased 22 equal undivided 24th parts of La Abra mine for $22,000, gold, for which the owners took shares of the Company's capital stock at par to the same amount, and also subscribed and paid for other shares at par in gold. (*Record*, 38, 167, 212.) The title of the Company to the mines it claimed to own is admitted by the complainant. (*Record*, 647, "Stipulation.")

All the shares subscribed for—namely, 1,570 for $100 each—were taken at par on a gold basis, and produced $235,000 in United States currency.* (*Record*, 169, 175, 653, 654, 678.)

The Company put up reduction works and other buildings at Tayoltita, and transported a stamp mill and machinery from Mazatlan, over the mountains, to the mines, and extracted large quantities of ore, the reduction of which was commenced at the mill in the spring of 1867. The expenditures and liabilities of the Company incurred in these operations—including the purchase price of the mines and the conduct of the business in New York—amounted to $341,796.06, reckoning gold, in which the expenditures were mostly made, at 150 in United States currency.† (*Record*, 9, 38, 39, 746.)

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*The following is from Mr. Ely's testimony in the Senate investigation, February 27, 1889:

> "A. I knew distinctly that it was currency. He (Mr. Collins) told me the $235,000 was currency. That was the only proper way to state it in New York. When you say a dollar there you mean currency. I did not know how the Commission was going to render this award, gold or currency, or what not. I knew nothing about that." (Rep. No. 2705, Sen., 50th Cong., 2d Sess., 969.)

†It is stipulated in this suit "that from March, 1865, to March, 1868, gold was at an average premium of 50 per cent. or thereabouts, in New York." (*Record*, 746.)

The local magistrates were hostile to the Company and unlawfully interfered with the conduct of its business at Tayoltita (*Record*, 31, 35, 36, 41, 44, 45, 47, 52, 75, 78, 81, 82, 87, 88, 104, 112, 154, 171); the Company's supply trains were seized by military officers and large sums were exacted and paid for their release (*ib.*, 31, 35, 47, 56, 58, 62, 72, 74, 171); two of the Company's trainmasters (one of them a citizen of the United States) were murdered (*ib.*, 47, 49, 52, 56, 60, 63, 72, 74, 171, 172); the Company's ores at the mouth of the mine and on the "patio" were stolen (*ib.*, 32, 49, 57, 61, 83, 88, 98, 152, 185, 186); orders and threats of ejectment were unlawfully made by the Prefect at San Dimas and the local magistrate at Tayoltita (*ib.*, 49, 52, 54, 72, 73, 124, 125, 129); Judge Soto unlawfully seized some land belonging to the Company and put up reduction works on it (*ib.*, 123—"4thly"—278, 279); the Company's superintendent was unlawfully imprisoned in January, 1868, and, after appealing in vain to the higher authorities of the State of Durango for protection and redress, he was forced to abandon the Company's property and business late in February or early in March, 1868 (*ib.*, 31, 48, 61, 68, 69, 70, 83, 87, 119, 120, 128, 129, 152, 154, 155, 156, 655, 656, 712, 713); the local officials afterwards asserted that they had driven the Company away, and would never let it return (*ib.*, 49, 50, 57, 58, 69, 70, 73, 74, 84); and Judge Soto moved with his family into the Company's hacienda and took possession of its property when Exall left (*ib.*, 51, 52, 165, 179, 185).

A Convention for the settlement of claims was concluded between the United States and Mexico on the 4th of July, 1868, and proclaimed by the President on the 1st of February, 1869. This Convention provided (Art. I) that—

"All claims on the part of corporations, companies,

> or private individuals, citizens of the United States, upon the government of Mexico, arising from injuries to their persons or property by authorities of the Mexican Republic, and all claims on the part of corporations, companies, or private individuals, citizens of the Mexican Republic, upon the Government of the United States, arising from injuries to their persons or property by authorities of the United States, which may have been presented to either government for its interposition with the other since the signature of the treaty of Guadalupe Hidalgo between the United States and the Mexican Republic of the 2d of February, 1848, and which yet remain unsettled, as well as any other such claims which may be presented within the time hereinafter specified, shall be referred to two Commissioners—one to be appointed by the President of the United States, by and with the advice and consent of the Senate, and one by the President of the Mexican Republic." (Treaties, 1776–1887, pp. 700–703.)

Each claim was to be considered separately by the Commissioners, and, when they could not agree, it was to be referred to an Umpire, and a decision, whether of the Commissioners jointly or of the Umpire on their disagreement, was to be given upon each claim in writing. The Presidents of the two Republics solemnly and sincerely engaged to consider the decision of the Commissioners, or of the Umpire, as the case might be, as absolutely final and conclusive upon each claim decided upon by them or him, respectively, and to give full effect to such decisions without any objection, evasion, or delay whatsoever. (*Ib.*, Art. II.)

Awards were to be made to the citizens of the respective countries for the amounts allowed, respectively, on their claims, and payment was to be made to their respective Governments, with a proviso that—

> "The total amount awarded in all the cases decided in favor of the citizens of the one party shall

be deducted from the total amount awarded to the citizens of the other party, and the balance, to the amount of three hundred thousand dollars, shall be paid at the city of Mexico or at the city of Washington, in gold or its equivalent, within twelve months from the close of the Commission, to the Government in favor of whose citizens the greater amount may have been awarded, without interest or any other deduction than that specified in Article VI of this Convention. The residue of the said balance shall be paid in annual instalments, to an amount not exceeding three hundred thousand dollars, in gold or its equivalent, in any one year until the whole shall have been paid." (*Ib.*, Art. IV.)

The Commission was organized in Washington, with Mr. William Henry Wadsworth, of Kentucky, as Commissioner on the part of the United States, and Mr. Francisco Gomez Palacio as Commissioner on the part of Mexico; and it held its first meeting on the 31st of July, 1869. Mr. J. Hubley Ashton was agent for the United States, and Mr. Caleb Cushing was agent for Mexico. Dr. Francis Lieber was the first Umpire, and on his death, in October, 1872, was succeeded by the British Minister, Sir Edward Thornton, his government having consented to his assumption of the office, which he held till the close of the arbitration.

On February 23, 1870 (before La Abra Company's memorial was filed with the Commission), Mr. Fish, as Secretary of State, issued a circular in which (after referring to the provision of the Convention allowing eight months from the first meeting of the Commissioners for the presentation of claims which had not been previously presented to either Government) he gave the following notice:

"It is not, therefore, to be inferred from the fact of presentation that the Government thereby expresses any opinion upon the merits of the claims

presented, either as regards the facts of the case, which, in most instances, remain to be fully developed before the Commissioners, and of which the Department, therefore, can not judge, or as regards the principles of the law to be invoked in their support. The responsibility of deciding questions of fact and law rests with the Commissioners, but it has been and is the purpose of this Department to interpose no obstacle to the submission of any claim with such proofs and arguments in its support as the claimants may furnish." (*Record*, 742, 743.)

The Company's claim was submitted to the Commission by a memorial verified on the 14th day of June, 1870, notice of the claim having been previously given to the Mexican agent on the 30th of November, 1869, and to the Department of State on the 17th of March, 1870. The letter of the Company's attorneys to the Mexican agent (Mr. Caleb Cushing) giving him notice of the examination of witnesses for the Company and offering them for cross-examination, is printed, together with Mr. Cushing's reply.* (*Record*, 667, 668.)

The Company's claim was docketed as "*La Abra Mining Company* v. *Mexico*, No. 489."

Evidence was taken, *ex parte*, on both sides—26 witnesses being examined for the Company and 34 for Mexico. A considerable part of the Company's evidence

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*Senators were misinformed on this point during the debate on the bill (now the jurisdictional act), as is shown by what follows:

"Mr. MORGAN. The first appearance of the claim was before the Commissioners while they were in session, late in the progress of their investigations. Nobody knew about it till then." (*Congressional Record*, January 21, 1892, p. 461.)

After stating the number of claims against Mexico—894—which had been filed with the Commission prior to March 31, 1870, and the number—123—which were filed within the next three months, ending June 30, 1870, Mr. Morgan said:

"It will be observed that neither the Weil claim nor the La Abra claim has as yet come in. They were filed without having been previously notified to either of the governments."

was filed with its memorial, June 14, 1870. Mexico's evidence, in opposition, was filed October 30, 1873. The Company's evidence in rebuttal was filed October 3, 1874. The case was subsequently argued before the Commissioners, and their disagreement announced in written opinions May 19, 1875 (*Record*, 7; 382–406), whereupon the case was referred to the Umpire, before whom it was also argued, and he rendered an award in favor of the Company December 27, 1875. (*Record*, 8–10.)

A motion for a rehearing, with an argument of over fifty printed pages, was filed with the Umpire on the 19th of September, 1876, and denied by him on the 20th of the following month. (Ex. Doc. No. 103, H. R., 48th Cong., 1st Sess., 73–128.)

It was charged in the trial of the case before the Commission, and stated in the opinion of the Mexican Commissioner, that much of the Company's evidence was false and was obtained by fraudulent practices on the part of General Alonzo W. Adams, who was employed by the Company to obtain evidence in support of the claim in Mexico. (*Record*, 405, 406, 413.) The testimony of various witnesses was before the Commission on this subject, some impeaching and others defending General Adams' conduct (*ib.*, 111, 113, 128, 162–164, 178,

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After referring to the various extensions of the time granted to the Commission, Mr. Morgan said that—

> "It took three additional conventions to cover, not merely the claims that had been presented under the original convention and in pursuance thereof, but to cover the enormous raft of claims that came in afterwards, unindorsed and unvouched by either of the governments." (*Congressional Record*, January 27, 1892, p. 585.)

But every one of these additional conventions provided—

> "that nothing contained in this article shall in anywise alter or extend the time originally fixed in the said convention for the presentation of claims to the Mixed Commission." (Treaties, 1776–1887, pp. 706, 707, 708.)

179, 189–191), and after the case had been pending five years an award was rendered in the Company's favor as aforesaid.

The Commission was extended from time to time, so that it finally expired on the 31st of January, 1876, but the Umpire was "allowed a further period, until the 20th day of November, 1876." (Treaties, 1776–1887, p. 710.) The date of the last award made by the Umpire—*Garza* v. *Mexico*—was July 31, 1876, and it was to this date that interest was reckoned when allowed by the Umpire "to the date of the final award." (Mr. Ashton's Report, Ex. Doc. No. 31, Sen., 44th Cong., 2d Sess., p. 6.)

The Mexican agent attempted to file a statement at the close of the Commission, reserving—

> "the right to show at some future time and before the proper authority of the United States that the claims of Benjamin Weil, No. 447, and La Abra Silver Mining Company, No. 489, both on the American docket, are fraudulent, and based on affidavits of perjured witnesses."

But the agent of the United States would not consent, and when Mr. Mariscal addressed Mr. Fish on the subject, the latter replied, under date of December 4, 1876, declining—

> "to entertain the consideration of any question which may contemplate any violation of or departure from the provisions of the Convention as to the final and binding nature of the awards, or to pass upon, or by silence to be considered as acquiescing in, any attempt to determine the effect of any particular award." (Ex. Doc. 103, H. R., 48th Cong., 1st Sess., 131.)

To this Mr. Mariscal replied, on the 8th of December, 1876 (*ib.*, 131)—

> "that if such an appeal should be made, it will not be resorted to as a means of discarding the obli-

gation which binds Mexico, and that, should it prove unsuccessful, the Mexican government will recognize its obligation as before."

But by the following agreement—which was produced in evidence twelve years later—the Mexican government gave a third party and his employés a contingent pecuniary interest in the success of its "appeal." (*Record*, 434, 435; Rep. No. 2705, Sen., 50th Cong., 2d Sess., 915):

"This agreement, made this twenty-ninth day of March, A. D., 1877, by and between General James E. Slaughter, of Mobile, Ala., party of the first part, and Señor Don Ignacio Mariscal, Minister of Mexico to the United States, party of the second part:

"Witnesseth, that the said party of the first part agrees, for the considerations hereinafter named, to undertake the proof of fraud in the claim of the La Abra Mining Company against the Government of Mexico, which claim is numbered four hundred and eighty-nine (489) on the docket of the Joint Commission of the United States and Mexico, and has been adjudicated by the Umpire of said Commission.

"To this end the said party of the first part agrees to send an agent to Mexico for the purpose of securing testimony in proof of the fraudulent character of said claim; to pay the expenses of such agent as far as the City of Mexico; and to secure such assistance as may be necessary in preparing the evidence so obtained and presenting the same to the proper authorities of the Government of the United States.

"The said party of the second part, acting for and in behalf of the government of Mexico, hereby agrees to secure the payment by said government of all expenses incurred by the said agent of the party of the first part, after he shall have arrived in the City of Mexico; to see that all facilities are furnished by said government to enable him to secure the necessary testimony, and to pay, by draft payable as

hereinafter specified, one-half of the expense incurred by the said party of the first part in the preparation of evidence and the presentation of the same to the proper authorities of the Government of the United States; provided that such expense shall not exceed the sum of three thousand dollars ($3,000) American currency.

"And the said party of the second part further agrees, in consideration of the services above named, to pay to the said party of the first part, by drafts upon the national treasury of Mexico, payable in Mexican gold ten months after presentation at said treasury, a sum equal to ten *per centum* of any portion of said claim which may be waived or finally withdrawn by the proper authorities of the Government of the United States, or of its total amount if it be waived or withdrawn in the same manner; said drafts to be drawn by the Minister of Mexico at Washington immediately upon the final waiver or withdrawal of said claim or any portion thereof, as the case may be, by said authorities of the United States Government.

"In witness whereof we have hereunto set our respective hands and seals this twenty-ninth day of March, A. D., 1877.

"JAMES E. SLAUGHTER.*
"IGNACIO MARISCAL."

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* James E. Slaughter was examined in the Senate investigation on February 21, 1889. After stating that he had resided in Alabama since 1870, and that he was and had been since 1865 "a contractor in the improvement of rivers and harbors and railroads, etc.," and that he was "the General Slaughter who is so frequently mentioned in this case," he said that while in command of the Confederate forces on the Rio Grande he had an agreement with the Imperial and the Liberal forces for the surrender of criminals escaping from one side of the river to the other, and for the redress of outrages committed by people of one side on the citizens of the other side. His examination was then continued as follows (Rep. No. 2705, Sen., 50th Cong., 2d Sess., pp. 912, 913):

"It had been alleged that a large amount of cotton had been captured while I was in command there by the Mexican forces, and a claim had been put into the Mexican Commission by a man of the name of Weil, and the Mexican government asked me if I knew anything about it. I said that I did not; that

On the 6th of October, 1877, the Mexican government sent to the Department of State and circulated among members of Congress copies of two pamphlets (Ex. Doc. No. 103, H. R., 48th Cong., 1st Sess., p. 135), to which Mr. Evarts referred, in a letter to Mr. Swann, the chairman of the House Committee on Foreign Affairs, dated November 6, 1877, as follows:

> "Since that time the Mexican government has simply presented in pamphlet form the motions made for a rehearing before the Umpire (Sir Edward Thornton) in the cases of Benjamin Weil and of La Abra Mining Company, adding thereto the correspondence between the Mexican Minister, Don Ignacio Mariscal, and my predecessor, Mr. Fish, in

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Mr. Weil was in my office every day. I could confer authority—one of our means of raising revenue was to tax every bale of cotton exported $5—and it required the signature of myself or my agents before any cotton could be exported. In that way——

"Mr. WILSON. Will you pause there a moment? As I have no relation to the Weil case, I do not want to bring out any testimony about it. * * *

"The WITNESS. I merely say that the institution of the Weil case brought me in contact with the Mexican government, and they asked me if I could get up the evidence with regard to the Weil case. I told them yes, and I did so, and then they asked me with reference to La Abra case.

"Q. Will you please state what time this was? * * * A. It was about the spring of 1876. * * * Late in 1876 they begged of me to see if I could not help them in the case of La Abra."

* * * * * * *

"By Mr. WILSON (*ib.*, 914): Q. Now, general, since this contract have you had charge of the prosecution of this matter before Congress and in the departments?—A. Yes, sir.

"Q. And still have charge of it, have you?—A. Yes, sir.

"Q. Now state whether you have employed persons to assist you in that matter?—A. Yes, sir; I employed Mr. Lines to assist me.

"Q. When?—A. I employed Mr. Lines soon after signing the contract. I forget what day.

"Q. Well, do you know whether the Mexican government pays anybody excepting yourself?—A. No one at all, I think.

"Q. Do you know a man by the name of Green?—A. Yes.

"Q. Did you employ him to assist you?—A. I sent Green to Mexico to get that press-letter copy book.

> reference to these two cases. These motions were denied by the Umpire, and these awards, standing upon the same footing of finality under the Convention with all the others, are awaiting distribution." (Mis. Doc. No. 13, H. R., 45th Cong., 1st Sess., p. 2.)

From June, 1877, to January, 1878, Mr. Ladislao Gaona, a law officer of the Mexican government, was employed at Mazatlan in collecting the so-called "newly-discovered evidence" which was subsequently examined by Mr. Evarts and is now comprised in Exhibit B, attached to Mr. Attorney-General's bill in this suit. (*Record*, 197–310.) Mr. Gaona prepared the interrogatories for the examination of Mr. Frederick Sundell (*ib.*, 296), and he took part in the proceedings against Loaiza and Gamboa, who had given testimony for the Company (*ib.*, 580, 594, 595), and whose later affidavits are contained in Exhibit B. (*Ib.*, 292–295.)

On the 3d of December, 1877, at Mazatlan, Mr. Gaona wrote to Mr. Vallarta, the Mexican Minister of Foreign Affairs, as follows:

> "I have definitely arranged our agreement with Granger, and in order that he may have a voucher or document I have submitted a statement in reference to the stipulated conditions to the district court, which will remain on file there, and a certified copy thereof will be issued to him. Granger is disposed to produce the witnesses at Noria, San Ignacio, and San Dimas, and to bind them to testify upon such terms as will be arranged by common agreement beforehand." (*Record*, 575.)

Mr. Gaona had been authorized by Mr. Vallarta, by letter dated November 14, 1877, to conclude the agreement with Granger (*ib.*)—

> "provided he agrees in receiving the $3,500 only in case that the government shall be definitely and

completely exonerated from the payment of the indemnification awarded by the Umpire of the Mixed Commission to the La Abra Mining Company."

Granger, a British subject, had been in the employ of the Company as bookkeeper, and had given testimony, in 1870, in support of the claim before the Commission (*Record*, 46–51; 64, 65), but he remained in Mexico and "formed relations" with the step-daughter of the local magistrate, Gaudalupe Soto, and had been examined four times in opposition to the claim by the Mexican authorities. These later depositions of his were also before the Commission. (*Record*, 111–113; 119, 120; 128–130.)*

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* Senators were informed during the debate on the bill, in connection with Exall's letter of February 26, 1868, to Granger, that Granger had not been examined as a witness in the original trial:

"Mr. GEORGE. Has Granger testified in relation to the alleged trespass on the mines?

Mr. DOLPH. No; I do not think Granger's testimony is in the case. Granger is dead. Granger's testimony is not in the case, but there is proof here to show that Granger was in possession—that he was there exercising ownership—at least four years afterwards, in 1872." (*Cong. Record*, January 22, 1892, p. 540.)

Six days later in the debate, the inquiry as to Granger was repeated:

"Mr. GEORGE. Has Granger been examined?

"Mr. MORGAN. Granger is dead. I am not so sure about his evidence having been obtained, but I will find out. The Senator from Oregon (Mr. Dolph) prepared the report in the case. My recollection now is that Granger was not sworn. I think I can tell in a moment. I do not think he was sworn. Granger remained out in Mexico with his Mexican wife that he married there. He never came back to the United States. My recollection now is that they never got hold of him to swear him. It is probably a pity they did not.

* * * * * * *

"Mr. GEORGE. He was not examined before the Joint Commission?

Mr. MORGAN. That is what I was trying to find out. I do not think he was. * * * He never returned to the United States; but I did not know but that his deposition or affidavit might have been taken in Mexico. However, I do not remem-

In December, 1877, and January, 1878, under this agreement, Granger delivered the books and papers of the company to Gaona (*Record*, 575–577), but all the books except the letter-press copy book were withheld by the Mexican government till 1894, when they were produced by the Mexican Consul-General Coney in his examination, on behalf of the Mexican government in this suit, comprising in all twenty-eight exhibits. (*Record*, 565–569.)

The Mexican government not only withheld these books and papers from inspection by the Government of the United States from 1878 to 1894, although they contain important evidence in favor of the Company's claim, but kept demanding their production by the Company as if it had concealed or destroyed them.* The last of

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ber that it was, and I do not believe that it was. I can find out from the record before I get through with my remarks."

The Senator explained his difficulty, and his views of the weight that should be given to the committee's recommendation, as follows:

"That case is so awfully voluminous, and there is so very much of it, that it is almost impossible to condense a statement of it in such a form as to satisfy the Senate as to what the real state of facts is through and through. If I were before a jury trying this cause upon the facts, in order to do justice to my clients I should have to spend fully a week in the investigation of the testimony. I can not do it here. I do not wish to do it. I do not think it is necessary; I do not think it is proper; I do not think it is required of the committee. I do not suppose you wanted us to come here prepared to satisfy every Senator who might ask a question about any feature of this case so as to convince him that we were right in our conclusions about it." (*Cong. Record*, January 28, 1892, p. 645.)

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*The following is from Colonel De Lagnel's examination in the Senate investigation, September 28, 1888, when the books in question had been for more than ten years in the possession of the Mexican government:

"Mr. WILSON. I assert this: that the books and papers of this Company went into possession of the Mexican government, just as they got these letters that we have seen here. They were left there at the hacienda as part of the record in this case and the Mexican government got possession of them.

these demands was made in this suit. (*Record*, 461, 462.)

While the bill (which afterwards, when amended, became the Act of June 18, 1878) for the distribution of the awards, was under consideration, a pamphlet entitled "The Weil and La Abra Frauds—Petition of James E. Slaughter," and purporting to tell "The Story of the

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Mr. LINES. That is denied. (Rep. No. 2705, Sen., 50th Cong., 2d Sess., p. 47.)

"By Mr. FOSTER. * * * State what record, if any, was contained in any of the books of the Company in your charge of any loss of mules or supplies by seizure by the Mexican authorities previous to your arrival.

"Mr. WILSON. That calls for the contents of books?

"Mr. FOSTER. Yes; books which we can not get and do not know anything about."

Three years later, when the bill was under debate in the Senate, the Company was again charged with failure to produce its books and papers, and it was taken for granted that these records had been kept in New York as well as at Tayoltita, where the Company's works and mines were situated and its mining business had been carried on. It will be observed, in what follows, that Senator Morgan expressed his belief that the Company had acted with bad faith in this matter:

"Mr. GEORGE. Did the committee use all the means in their power to get possession of the books and papers?

Mr. DOLPH. We did. We subpœmaed everybody who we supposed knew anything about them. They were demanded of the attorneys of the Company, and every other step was taken that is known to the practice in such cases.

Mr. MORGAN. There was a *subpœna duces tecum* issued to every person we could hear of who had had possession of or any connection with the books at all—stockholders, treasurer, and secretary. The secretary of the Company was dead, and Garth was treasurer and a large stockholder. Garth kept his books and the book of correspondence in the secretary's office, and when he would write a letter in his own office he would take it to the secretary's office in New York and there have it copied into the letter-press book.

Garth, who had understood that the secretary had put the books in some loft or garret somewhere, had made one or two searches for them. The attorney of the Company, who had been all the time prosecuting this claim, when on the stand had an entire absence of any knowledge or recollection about the treasurer's books or any account books of the Company. They had all vanished. The committee, however, used very diligent efforts to get those records brought before it, and failed entirely, which I thought, and believe, resulted from an effort on the part of the Company to conceal the evidence." (*Cong. Record*, January 21, 1892, p. 461.)

Mine," was circulated among members of Congress, although it had never been introduced in either House.* (*Record*, 656, 754–802.) A bill for making distribution on all the awards had passed the House on the 9th of February, 1877, but its passage had been prevented in the Senate by a statement from Senator Spencer, of Alabama, that he "had received a dispatch from a constituent of his, a citizen of Mobile, to the effect that the constituent had positive proof of fraud in connection with the Mexican Commission." (Rep. 27, Part 2, H. R., 45th Cong., 2d Sess., p. 3, citing p. 1548 *Congressional Record*, 44th Cong., 2d Sess.) On the 7th of November, 1877 (after the contract between the Mexican government and "General James E. Slaughter of Mobile, Alabama," had been signed), Mr. Forney, of Alabama, introduced a joint resolution in the House of Representatives directing the Treasurer of the United States "to pay no moneys on account of said two claims until further information is obtained by Congress." (*Record*, 760.)

In Mr. Evarts' letter to Mr. Swann (*supra*) he had said that it would have been "according to the practice of the Government" for him to distribute the money received from the Mexican government, but that he had hesitated to make the distribution—

> "because of some legislation being necessary to make good to the fund the amount with which the

*On the 25th of July, 1878, Mr. Zamacona inclosed with a note to Mr. Evarts "a printed extract containing a portion of the evidence" which—Mr. Zamacona said—"shows the fraudulent character of the claims in question," (Ex. Doc. No. 103, H. R., 48th Cong., 1st Sess., p. 161.) The matter so inclosed, referring to La Abra Company, was headed "Appendix B—The Story of the Mine" (*ib.*, pp. 169–188), and is identical with the matter contained in the so-called Slaughter petition, under the same heading. (*Record*, 761–802.)

Government of the United States is chargeable,* and because it is desirable that the form and manner of the reservation from the installment in hand of the expenses of the Government should now be settled." †

The act for the distribution of the awards was finally passed on the 18th of June, 1878, and contained the following provision (20 Stats., 145):

"SEC. 5. And whereas the government of Mexico has called the attention of the Government of the United States to the claims hereinafter named, with a view to a rehearing; therefore be it enacted, That the President of the United States be, and he is hereby, requested to investigate any charges of fraud presented by the Mexican government as to the cases hereinafter named, and if he shall be of the opinion that the honor of the United States, the principles of public law, or considerations of justice and equity require that the awards in the cases of Benjamin Weil and La Abra Silver Mining Company, or either of them, should be opened and the cases retried, it shall be lawful for him to withhold payment of said awards, or either of them, until such case or cases shall be retried and decided in such manner as the governments of the United States and Mexico may agree, or until Congress shall otherwise direct. And in case of such retrial and decision, any moneys paid or to be paid by the Republic of Mexico in respect of said awards,

* This amount was the sum total of the awards to citizens of Mexico against the United States, which the Mexican government had been allowed by the Convention to deduct from the sum total of the awards to citizens of the United States against Mexico, and which Congress, by the Act of June 18, 1878, restored to the Secretary of State, so as to put the whole amount awarded to citizens of the United States in his hands for distribution.

† The Convention provided (Art. VI) that the whole expenses of the Commission should be defrayed by a ratable deduction on the amount of the sums awarded by the Commission, not exceeding five per cent., and that if such percentage was insufficient the deficiency should be defrayed in moieties by the two governments.

respectively, shall be held to abide the event, and shall be disposed of accordingly; and the said present awards shall be set aside, modified, or affirmed, as may be determined on such retrial: *Provided*, That nothing herein shall be construed as an expression of any opinion of Congress in respect to the character of said claims, or either of them."

By direction of President Hayes, Mr. Evarts made an examination of the evidence submitted by the Mexican government in support of its charges—including the letter-press copy book—and after hearing elaborate arguments by counsel on both sides, he reported on the 8th of August, 1879—

> "That neither the principles of public law nor considerations of justice or equity require or permit, as between the United States and Mexico, that the awards in these cases should be opened and the cases retried before a new international tribunal, or under any new convention or negotiation respecting the same between the United States and Mexico."

He added, however, that he was of opinion—

> "that the matters brought to the attention of this Government on the part of Mexico do bring into grave doubt the substantial integrity of the claim of Benjamin Weil and the sincerity of the evidence as to the measure of damages insisted upon and accorded in the case of the La Abra Silver Mining Company, and that the honor of the United States does require that these two cases should be further investigated by the United States to ascertain whether this Government has been made the means of enforcing against a friendly power claims of our citizens based upon or exaggerated by fraud."

And he concluded this report as follows:

> "It may be that, as the main imputation in the case of the La Abra Silver Mining Company is of a fraudulent exaggeration of the claim in its measure

of damages, it may consist with a proper reservation of further investigation in this case to make the distribution of the installments in hand. I have this subordinate consideration still under examination, and, should you entertain this distinction, will submit my further conclusions on this point." (Ex. Doc. No. 150, Sen., 46th Cong., 2d Sess., pp. 2, 3.)

The President having approved this report on August 13th, 1879, it was communicated to the respective parties, and, on the 1st of September, counsel for the Mexican Government filed a motion in the Department of State for a rehearing, and entered their—

"protest against the distribution of any portion of the installments already paid to the credit of La Abra claim, upon the assumption that the charges of fraud preferred by Mexico in that case go only to the measure of damages insisted upon and allowed, and not to the integrity of the claim itself." (Ex. Doc. No. 103, H. R., 48th Cong., 1st Sess., pp. 573–581.)

This motion contained an elaborate argument showing that Mexico charged, and attempting to show that the fact was, that the whole of the award had been obtained by fraud.

On the 3d of September, 1879, Mr. Evarts reported his conclusions to the President—by whom they were approved on the 5th of that month—the first of which reads as follows (*ib.*, 583):

"Upon a renewed examination of the matter, as laid before me by the Mexican government, I am confirmed in the opinion that the proper limits of the further consideration, which the honor of the Government should prompt it to give to this award, should confine the investigation to the question of a fraudulent exaggeration of the claim by the parties before the Commission to which, under the provisions of the Convention, it was presented by this Government." (Ex. Doc. No. 150, Sen., 46th Cong., 2d Sess., p. 3.)

Mr. Evarts also reported that, in his opinion, it would be proper to pay to the Company its distributive share of the installments that had been received from the Mexican government.

On the 9th of September, 1879, counsel for Mexico filed a motion with Mr. Evarts for a reconsideration of this decision, in which the case was again reargued.

On the 17th of September, 1879, the Department of State paid to S. S. Ely, treasurer of the Company, its share of the three annual installments which had been received from the Mexican government. (Ex. M, "Confidential," 47th Cong., 1st Sess., p. 6.)

On the 15th of April, 1880, President Hayes communicated these reports, with a supplemental report from Mr. Evarts, dated the 13th of that month, to the Senate, and they were referred to the Committee on Foreign Relations and ordered to be printed. They comprise the Executive document (Sen. No. 150) heretofore cited.

In his final report—referring evidently to his earlier suggestion that the Executive was not furnished with the means of coercing the attendance of witnesses and examining them on oath—Mr. Evarts expressed the opinion that Congress should decide whether to make the necessary provision for such a further investigation, and he concluded as follows:

> "Unless Congress should now make this disposition of the matter and furnish thereby definite instructions to the Department to reserve further payments upon the awards till the conclusion of such investigation, and to take such further order with the same thereafter as Congress might direct, it would appear to be the duty of the Executive to accept these awards as no longer open to reconsideration, and proceed in the payment of the same *pro rata* with all other awards under the Convention."

This, as already stated, was communicated by the President to the Senate on the 15th of April, 1880.

On the 27th of April, 1880, Senator Morgan, by request, brought in a bill (S. 1682) "directing the Court of Claims to investigate the claims of Benjamin Weil and La Abra Silver Mining Company," which was read twice and referred to the Committee on the Judiciary.

After providing that the Secretary of State should certify to the court the evidence that was before the Commission and that further testimony might be taken on either side, the bill provided:

> "SEC. 5. That upon the completion of said proofs, and within a year from the passage of this act, the said court shall render its opinion, upon the record and the new evidence, whether said claimants should have recovered any, and, if any, what, damages for the acts of the government of Mexico, its officers or agents, as alleged in their respective claims. Said opinion shall be transmitted to the President, who is hereby requested to notify the government of Mexico thereof when the same shall have been rendered, and that the United States release the said government from the payment of said claims, or insist upon the payment of the whole or a portion of both, or either of them, in accordance with said opinion."

On the 10th of June, 1880, the Senate Committee on the Judiciary reported against the bill, and recommended its indefinite postponement, on the following grounds:

> "The bill under consideration proposes to withdraw these two claims from the dominion of international jurisdiction and place them before a tribunal organized and existing solely by virtue of the laws of this country, and in this way it would seem designed to avoid the opening up of other questions of complaint that are known to exist on behalf of citizens of the United States whose claims, for various causes, failed to receive favorable consideration by said Commission under the treaty creating the Com-

mission." (Rep. No. 712, Sen., 46th Cong., 2d Sess., p. 6.)

The President's message of April 15, 1880, containing Mr. Evarts' final report, is reprinted, in its entirety, in the Judiciary Committee's report, referring to which the committee say (*ib.*, p. 5):

> "It will be seen from this report, with respect to La Abra mining claim, the principal ground of complaint is exaggeration of damages, and upon that question it does not appear that any fault whatever attaches to the Commission before whom it was examined, nor to the Referee by whom it was affirmed. It also appears that the Department of State so far passed upon the question of excessive damages as to determine the claimants to be entitled to the installments already paid in, and that the Executive had directed the amounts to which the claimants were thus entitled to be paid over; and while the remaining installments not yet received may be regarded as subject to retention to meet the question of a reduction of damages, it virtually determines the question submitted to the Executive Department by the said fifth section, so far as that claim is involved."

On the 10th of June, 1880, the Senate adopted the Judiciary Committee's report, and indefinitely postponed the bill. (*Congressional Record*, 46th Cong., 2d Sess., Vol. 10, pt. 5, p. 4347.)

On the 12th of June, 1880, the Committee on Foreign Affairs of the House of Representatives, having reported a similar bill favorably, asked leave to withdraw the report and the bill from the further consideration of the House, and by unanimous consent the bill and report were so withdrawn. (*Ib.*, p. 4486.)

On the 13th of July, 1880, Mr. Navarro notified Mr. Evarts that Mexico's counsel were preparing to bring suit in the District of Columbia "against the promoters

of the fraudulent claim of Benjamin Weil and that of La Abra Company." These proposed proceedings, to be brought "in the name of Mexico," were explained and justified by Mr. Navarro at great length in his letter of August 12, 1880, in answer to Mr. Evart's note of the 4th of that month. (Ex. Doc. No. 103, H. R., 48th Cong. 1st Sess., pp. 611–621.) But no such proceedings were ever taken.

On the 14th of August, 1880, the fourth installment of the award was ordered to be paid to the Company and its assigns by President Hayes. (Ex. Doc. No. 109, Sen., 50th Cong., 1st Sess., p. 9.)

On the 6th of November, 1880, Mr. Navarro withdrew from the Department of State all the documents comprised in the so-called newly-discovered evidence, and gave a receipt, with a list of the papers in detail. (Ex. Doc. No. 103, H. R., 48th Cong., 1st Sess., pp. 623, 624.)

On the 5th of February, 1881, Mr. Evarts notified Mr. Navarro (in answer to a request for further suspension of payment)—

> "That the decision of the President in the Weil and La Abra cases, as heretofore communicated to your Legation, must be regarded as the final determination of the Executive Government that the awards under the Commission organized pursuant to the terms of the Convention of July 4, 1868, can not be reconsidered, diplomatically, between the two governments; and that, consequently, the administration of the payments to the parties interested in the awards belongs exclusively to the Government of the United States in its obligations to its own citizens. This administration is regarded by the President as requiring the distribution of the awards in these cases upon the same regulations as in all other cases, in the absence of any direction by Congress to the contrary."

On the 5th of March, 1881, the Department of State

paid to S. S. Ely, treasurer of the Company, its share of the fifth installment, since which time no further payment has been made to the Company or its assigns on account of the award.

On the 20th of July, 1882, President Arthur transmitted a Convention which had been negotiated by Mr. Frelinghuysen for the United States, and Mr. Romero for Mexico, "providing for the reopening and retrying of the claims of Benjamin Weil and La Abra Silver Mining Company against Mexico, signed on the 13th day of July, 1882." (Ex. M. Confidential, 47th Cong., 1st Sess., pp. 1–5.)

The action taken on the Convention in the Senate during the 47th and 48th Congress is stated as follows (*ib.*, p. 1):

"*July 26, 1882.* Read. Convention read the first time, referred to the Committee on Foreign Relations, and, together with the message and accompanying documents, ordered to be printed in confidence for the use of the Senate.

August 7, 1882. Reported without amendment, and with the recommendation that the Senate advise and consent to the ratification of the same.

January 15, 1883. Rejected. Motion made to reconsider, and motion made to lay the motion to reconsider on the table.

February 27, 1883. Motion to lay the motion to reconsider on the table withdrawn, and the further consideration of the Convention postponed to the first Monday in December next.

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December 11, 1883. Referred to the Committee on Foreign Relations.

May 21, 1884. Reported by Mr. Miller, of California, with amendments, viz, omit the parts in brackets and insert the parts printed in *italics*."

While this convention was pending in the Senate La Abra Company and an assignee of part of the Weil award (*Key*) brought suits in the Supreme Court of the District of Columbia to obtain writs of mandamus requiring the Secretary of State to pay to the several relators their respective shares of the installment received from Mexico in 1882. The Secretary answered in the

Key case and demurred to La Abra Company's petition. Key demurred to the Secretary's answer, and the court sustained the demurrer, and awarded a peremptory writ as prayed for. The Secretary of State appealed to this court, and so did La Abra Company from the decision sustaining the Secretary's demurrer. The two cases—*Frelinghuysen* v. *Key* and *La Abra Company* v. *Frelinghuysen*—were considered and decided together in this court, January 7, 1884. (110 U. S., 63–76.)

The opinion in these cases, which was delivered by Mr. Chief Justice Waite, closed as follows:

> "Of course, in what we have said, we express no opinion on the merits of the controversy between Mexico and the relators. Of that we know nothing. All we decide is, that it was within the discretion of the President to negotiate again with Mexico in respect to the claims, and that as long as the two governments are treating on the questions involved, he may properly withhold from the relators their distributive shares of the moneys now in the hands of the Secretary of State."

On the 21st of April, 1886, this Convention was rejected, after having been before the Senate nearly four years. (Ex. Doc. No. 109, Sen., 50th Cong., 1st Sess., p. 5.)

On the 5th of August, 1886, the House Committee on Foreign Affairs reported, by Mr. Daniel, against a bill (H. R. 8122) "to amend and enlarge the fifth section of an act approved June 18, 1878." This report defended the award on the merits. The committee consisted of thirteen members, ten of whom concurred in the report after hearing counsel for Mexico and the Company, and examining the letter-press copy book in full committee. There was a minority report signed by three members of the committee. (Rep. No. 3474, H. R., 49th Cong., 1st Sess., and part II.)

On the 1st of March, 1889, the Senate Committee on

Foreign Relations reported, by Mr. Dolph, in favor of a bill (S. 2632) to amend and enlarge the act approved June 18, 1878, etc. To this report is appended the testimony taken by a subcommittee under a resolution of the Senate. The chairman (Senator Sherman) dissented (*Record*, 452, 453), and there was a minority report signed by Senator Brown. (Rep. No. 2705, 50th Cong., 2d Sess., and Views of the Minority, part II,)

On December 18, 1889, Mr. Morgan introduced a bill (S. 374), and on December 10, 1891, Mr. Dolph introduced a bill (S. 539), both similar to the bill recommended in the last-named report, which, on account of the mass of testimony appended to it, was not reprinted. The bill (S. 539), after sundry amendments, was passed by the Senate on the 1st of February, 1892, and a motion which was made by Senator Daniel to reconsider the vote by which it was passed was defeated.

The chairman of the Judiciary Committee (Senator Hoar) had moved to amend the bill by striking out section 3, giving an appeal to this court, on the ground that—

> "the Supreme Court of the United States is only authorized to sit for the decision of cases in law or equity or admiralty arising under the laws and treaties of the United States or under the Constitution thereof, such as are defined in the jurisdictional clause; and it is well settled that the decision of a case within the constitutional sense is the final determination of some question of legal right, using the word 'legal' as including equitable in the technical sense arising between the parties described; and we can not impose upon that tribunal the duty of instructing the conscience or the understanding of any political department of the Government." (*Cong. Record*, January 21, 1892, p. 456.)

There was a long debate on this amendment, but Senator Morgan, who had charge of the bill, said he felt

"impelled to ask the Senate to hold on to this right of appeal," for he did not wish this case to "go out of the Congress of the United States with the slightest impeachment upon it."

> "I wish (he said) that none of these men may be able to say hereafter that we have violated any principle or usage of law in the disposal of this matter, but that it may be said that the Government of the United States has offered to these men, whom it has lately found itself compelled to bring into court, a full, fair, and impartial trial before a proper judicial tribunal of the country, and has given to the parties litigant all the full rights of appeal that would belong to a litigation between private individuals. So I prefer to hold on to that section of the bill." (*Cong. Record*, January 28, 1892, p. 646.)

On the day the bill passed the Senate, Mr. George, in the absence of Mr. Hoar, made an argument in support of the amendment, in which, on closing, he said that he was—

> "so confident that the third section was unconstitutional, that if it remained in the bill, although he desired, with all his heart, to render justice to Mexico, he would be compelled to vote against the proposed enactment." (*Cong. Record*, February 2, 1892, p. 786.)

Senator George's argument is singularly clear and forcible, and all the more impressive, because, on faith of the statements made in the majority report and on the floor of the Senate by the advocates of the bill, he believed that the award in its entirety had been obtained by fraud.

On the 20th of April, 1892, Mr. Geary, from the House Committee on Foreign Affairs, reported the last-named bill (Sen. 539) favorably. (Rep. No. 1143, H. R., 52d Cong., 1st Sess.)

This report, as originally prepared in the subcommittee, was strongly against the award, but the following clause, which strongly qualifies the rest of the report, if not entirely incompatible with it, was inserted before the report received the sanction of the committee:

> "This committee does not intend to impugn the integrity of the persons connected with the Company, nor constitute an opinion on the merits of the case. The stockholders doubtless invested their money in good faith, and it is fair to assume that the first superintendent, Bartholow, an important witness before the Commission, believed that the mines were valuable, and when he left them had high hopes of their future; but an examination of the testimony taken by the Senate committee throws doubt on that of Exall and all the witnesses who testified before the Commission as to any acts of hostility of the Mexican authorities tending to establish the charge that the Company was thereby forced to abandon its property. These points ought to be considered in the light of the new testimony."

On the 13th of December, 1892, this bill (S. 539) was passed by the House of Representatives and approved by the President on the 28th of that month. (27 Stats., 409.)

On the 30th of March, 1893, Mr. Attorney-General brought suit—under the provisions of the act—in the Court of Claims.

The act is printed in the opinion of the court overruling the demurrer. (*Record*, 328–330.)

On the 16th of September, 1893, the Company filed its demurrer. (*Record*, 311–315.)

On April 16, 1894, the demurrer was overruled by the Court of Claims, Mr. Justice Weldon delivering the opinion. (29 Ct. Clms., 432–522; *Record*, 318–356.)

The opinion of the court on the ninth ground of the

demurrer* was rendered by Mr. Justice Nott in the case of *The United States* v. *Alice Weil et al.* (29 Ct. Clms., 523–549; *Record*, 357–380.) Mr. Chief Justice Richardson concurred in holding that the act in question was valid—

> "because it was duly approved by the President during a recess of the same Congress in which it was passed by the House of Representatives and the Senate;" but he declined "to express an opinion upon the question not involved in the case—whether or not the President has a right to approve a bill after the Congress in which it was passed has expired."

He also said:

> "I am impressed with the view which has prevailed, and which, with the single exception of the Captured and Abandoned Property Act of March 12, 1863, has been adopted and followed in practice ever since the foundation of the Government, that the President for the time being is part of the legislative power of each separate Congress, like the Senate, which is a continuing body and that when a Congress expires by limitation his authority to approve bills of that Congress is gone." (29 Ct. Clms., 548, 549; *Record*, 380, 381.)

On November 30, 1896, after the Company had filed its answer (*Record*, 424–459) and new testimony had been taken on both sides (*ib.*, 461–802) and the case had been heard on the merits, the following order was made by the court (*Record*, 803):

> "In consequence of the death of the Chief Justice

* "That said act of Congress is inoperative and void on the further ground that it was never approved by the President of the United States as required by law, the only alleged approval which it ever received being on the 28th of December, A. D. 1892, when Congress was not in session, both Houses of Congress having adjourned on the 22d day of December, A. D. 1892, to the 4th of January, A. D. 1893." (*Record*, 314, 315.)

> (Richardson), the inability of one of the judges to sit in the case (Mr. Justice Davis), and the difference in the minds of the judges who sat in the former hearing, this case is remanded to the trial calendar to be heard before four judges when the condition of the bench will permit."

On January 29, 1897, a bill passed the Senate "to insure a full bench in the Court of Claims for the hearing of the cases entitled The United States *against* La Abra Silver Mining Company and others" (S. 3588), and its passage was subsequently recommended by the Judiciary Committee of the House, but it was not reached, and the case was again argued before four judges.

On the 24th of June, 1897, the opinion of a majority of the court was delivered by Mr. Justice Weldon, to the effect that the whole of the award was obtained by fraud (32 Ct. Clms., 462–521; *Record*, 842), Mr. Chief Justice Nott dissenting (32 Ct. Clms., 521–533; *Record*, 843–851), and the following decree was entered:

> "The court finding from the evidence that the award made by the United States and Mexican Mixed Commission in respect to the claim of the said company was obtained, as to the whole sum included therein, by fraud effectuated by means of false swearing and other false and fraudulent practices on the part of said company and its agents; it is therefore hereby ordered, adjudged and decreed that all claims in law and equity on the part of the said company, its legal representatives and assigns, be forever barred and foreclosed of all claim to the money received from the Republic of Mexico for or on account of such award." (*Record*, 852.)

On the 24th of January, 1898, this court (denying a motion made by the appellant—that the constitutional objections to the jurisdictional act should be first heard and determined)—said, per Mr. Chief Justice Fuller:

> "When the case is called, counsel will be expected to discuss in the first instance these questions:

"Whether the Court of Claims has jurisdiction of this case?

"Whether this court has jurisdiction of this appeal?

"Whether the appellate jurisdiction, if any, of this court extends to a review of the facts?"

I.

The Court of Claims has no jurisdiction over this matter, because it is not a "case" within the meaning of the Constitution, nor is it a "controversy" in which the United States is a party.

The act approved December 28, 1892, plainly attempts to confer strictly judicial power on the Court of Claims and this court. The first section of the act authorizes and directs the Attorney General of the United States to bring *suit* or *suits* in the name of the United States "to *determine* whether the award made by the United States and Mexican Mixed Commission in respect to the claim of the said La Abra Silver Mining Company was obtained, as to the whole sum included therein or as to any part thereof, by fraud, effectuated," etc., and, "in case it be so *determined*, to *bar* and *foreclose* all claim in *law* or *equity* on the part of the said La Abra Silver Mining Company, its legal representatives or assigns, to the money," etc. The second section provides that "*full jurisdiction* is hereby conferred on the Court of Claims to hear and *determine* such suit and to make *all* interlocutory and *final decrees* therein * * * and to *enforce* the same by *injunction* or any proper *final process*." The third section gives an appeal to this court "from any *final decision*" of the Court of Claims. The fourth section provides that "in case it shall be *finally adjudged* in said cause" that the award was obtained by fraud as aforesaid, and that

the said Company, its legal representatives or assigns, "be *barred and foreclosed* of *all* claim to the money * * * the President of the United States is *hereby* authorized to return to said government any money * * * which such court shall *decide* that such persons are not entitled, in justice and equity, to receive out of said fund." The fifth section provides for payment "to the persons entitled thereto," "in case it shall be *finally adjudged* in said cause, either in the Court of Claims or in the Supreme Court of the United States, that the *award*, * * * or any definable and severable part thereof, was not obtained through fraud as aforesaid." (*Record*, 328–330.)

The court below held that it is "the expressed purpose of the act to confer jurisdiction on the court," and that it "provides a very complete, plain, and ample jurisdiction, to deal with the subject-matter of the controversy, in the broadest scope and exercise of judicial authority." (*Record*, 339.)

But the Government is not at liberty to make up a case for the courts thus to adjudicate. It has no real interest in the fund in controversy—does not claim it as proprietor. Indeed, the jurisdictional act provides that the fund in controversy shall go either to the appellant or to Mexico, and does not admit of a decree for or against the United States." (*Curtner* v. *United States*, 149 U. S., 662.) To become "a case," the subject must be submitted to the court by a party who "*asserts his rights*." (*Osborn* v. *U. S. Bank*, 9 Wheat., 738, 819.) There must be parties to come into court who can be reached by its process and bound by its power. (Curtis' Comm., sec. 85 *et seq.*)

Article III, section 2, clause 1 of the Constitution declares that—

> "The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

In a memorable debate in the House of Representatives, in February and March, 1800 (Annals of Congress, 6th Congress, 511–621), upon the question whether the surrender of fugitive criminals to foreign powers is an executive or judicial function, John Marshall, afterwards Chief Justice, construed this clause of the Constitution, in a speech which is preserved in an appendix to one of the volumes of this court's opinions.

Mr. Wheaton's report of that speech contains the following:

> "The gentleman from New York had relied on the second section of the third article of the Constitution, which enumerates the cases to which the judicial power of the United States extends, as expressly including that now under consideration. Before he (Mr. Marshall) examined that section, it would not be improper to notice a very material misstatement of it made in the resolutions offered by the gentleman from New York. By the Constitution, the judicial power of the United States is extended to all cases in law and equity arising under the Constitution, laws, and treaties of the United States; but the resolutions declare the judicial power to extend to all questions arising under the Constitution, treaties, and laws of the United States. The difference between the Constitution and the resolutions was material and apparent. A case in law or equity was a term well understood and of limited signification. It was a controversy between parties which had taken a shape for judicial decision. If the judicial power extended to every question under the Constitution, it would involve almost every subject proper for legislative discussion and decision; if to every question under the laws and treaties of the United States, it would involve almost every subject on which the executive could act. The division of power which the gentleman had stated could exist no longer, and the other departments would be swallowed up by the judiciary. * * *
>
> "By extending the judicial power to all cases in

> law and equity, the Constitution had never been understood to confer on that department any political power whatever. To come within this description, a question must assume a legal form for forensic litigation and judicial decision. There must be parties to come into court who can be reached by its process and bound by its power; whose rights admit of ultimate decision by a tribunal to which they are bound to submit." (5 Wheaton, Appendix, pp. 16 and 17.)

In *Cohens* v. *Virginia*, 6 Wheaton, 264, 305, counsel had maintained that the judicial power of the Federal courts did not extend to all cases of a judicial character arising under the Constitution and laws of the United States and treaties made, etc., adding:

> "It will be remembered by the court that the words are, not all questions, but all cases. Although, therefore, a question may arise, yet before there can be a case, there must be parties over whom the court can take jurisdiction; and if there be no such parties, the court can not act upon the subject, though the question may arise, though it may be clearly of a judicial nature, and though there may be the clearest violation of the Constitution."

In commenting upon this, Chief Justice Marshall said (page 405):

> "The article does not extend the judicial power to every violation of the Constitution which may possibly take place, but to 'a case in law or equity,' in which *a right*, under such law, is asserted in a court of justice. If the question can not be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the Constitution, to which the judicial power of the United States would extend."

In the same opinion the Chief Justice defines a suit. He says (page 408):

> "What is a suit? We understand it to be the prosecution, or pursuit, of some claim, demand, or request. In law language, it is the prosecution of some demand in a court of justice. The remedy for every species of wrong is, says Judge Blackstone, 'the being put in possession of that right whereof the party injured is deprived.' 'The instruments whereby this remedy is obtained, are a diversity of suits and actions which are defined by the Mirror to be "the lawful demand of one's rights;" or, as Bracton and Fleta express it, in the words of Justinian, "*Jus prosequendi in judicio quod alicui debetur.*"' Blackstone then proceeds to describe every species of remedy by suit; and they are all cases where the party suing claims to obtain something to which he has a *right.*"

In *Osborn* v. *The Bank*, 9 Wheaton, 739, 819, the same Chief Justice said:

> "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when a subject is submitted to it by a party who asserts his *rights* in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States."

See, also, Paschal, Anno. Const., 194 *et seq.*, and cases cited; Story on the Const., sec. 1648.

Justice Miller, in his lectures on the Constitution (p. 315), after stating that the definitions of the term "case" are numerous, declares none is better than the one given by Chief Justice Marshall in the case of *Osborn* v. *The Bank, supra.*

In *Georgia* v. *Stanton*, 6 Wall., 50, 76, it was said:

> "In order to entitle the party to the remedy, *a case* must be presented *appropriate for the exercise of judicial power;* the rights in danger, as we have seen, must be rights of persons or property; not merely political rights, which do not belong to the jurisdiction of a court, either in law or equity."

In this opinion, the following language of Mr. Justice Thompson, in *Cherokee Nation* v. *Georgia*, 5 Pet., 1, was cited with approval:

> "I do not claim for this court the exercise of jurisdiction upon any matter properly falling under the denomination of political power. * * * Much of the matters therein [in the bill] contained by way of complaint would seem to depend for relief upon the exercise of political power, and, as such, appropriately devolving upon the Executive, and not the Judicial Department of the Government. This court can grant relief *so far only as the rights of persons or property are drawn in question and have been infringed.* * * * It is only where *the rights of persons or property are involved*, and when such rights can be presented under some judicial form of proceedings, *that courts of justice can interpose relief.*" (See these extracts in Miller on the Constitution, 314, 315, *note.*)

> "Not all cases and controversies which may have their basis in the Constitution, or a law or a treaty of the United States are necessarily judicial in their character. There are many questions of a legal nature in the settlement of which facts are to be ascertained, and in respect to which judgment is to be exercised upon the provisions of law applicable to them, but which do not come within the scope of the judicial power provided for in the third article of the Constitution. They do not belong to the 'cases' and 'controversies' specified in this article. They are rather political than judicial in their nature, and hence it is not the province of courts, as such, to de-

termine them. Some of them are to be determined by the Executive Department and some of them by Congress. The judicial power to be exercised by the Federal courts, as courts, is limited to such 'cases' and 'controversies' as *admit of final settlement* by these courts, when brought before them in accordance with the provisions of law." (Spear on *The Law of the Federal Judiciary*, pp. 6, 7).

The method of executing the award, which is a part of the treaty, must be determined, not by the courts, but by the President.

On a subject of this nature Representative Marshall, in the speech already cited, said:

> "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him.
>
> He possesses the whole executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him.
>
> He is charged to execute the laws. A treaty is declared to be a law. He must then execute a treaty, where he, and he alone, possesses the means of executing it.
>
> The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the Constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. The means by which it is to be performed—the force of the nation—are in the hands of this person."
>
> * * * * * * *
>
> "The Executive is not only the constitutional department but seems to be the proper department to which the power in question may most wisely and most safely be confided.
>
> The department which is intrusted with the whole

foreign intercourse of the nation, with the negotiation of all its treaties, with the power of demanding a reciprocal performance of the article, which is accountable to the nation for the violations of its engagements with foreign nations and for the consequences resulting from such violation, seems the proper department to be entrusted with the execution of a national contract like that under consideration.

If at any time policy may temper the strict execution of the contract, where may that political discretion be placed so safely as in the department whose duty it is to understand precisely the state of the political intercourse and connection between the United States and foreign nations, to understand the manner in which the particular stipulation is explained and performed by foreign nations, and to understand completely the state of the Union?

This department, too, independent of judicial aid, which may, perhaps, in some instances be called in, is furnished with a great law-officer, whose duty it is to understand and advise when the *casus foederis* occurs." (5 Wheat., Appendix, 26–28.)

Elsewhere in this brief authorities are given in support of the proposition that the questions involved in this proceeding are of a political character and are to be determined exclusively by the Executive.

The Court of Claims could have been authorized to investigate this matter and *advise* the President. In that case this court could not have entertained an appeal from its decision. (*Re Sanborn*, 148 U. S., 222.) But the Court of Claims has "ordered, adjudged, and decreed that all claims in law and equity on the part of said Company, its legal representatives and assigns, be forever barred and foreclosed of *all claim to the money received from the Republic of Mexico for or on account of such award.*" And, in case of such foreclosure, the act provides that "the President of the United States is *hereby* authorized to

return to said government any money paid by the government of Mexico on account of said award remaining in the custody of the United States."

Other objections to this extraordinary and anomalous decree are stated elsewhere in this brief, and it is therefore sufficient to say in this connection, that if it were to stand, and could be enforced, it would not only reverse and set aside the President's conclusion that La Abra Company had a valid complaint against Mexico, and that the honor of the Government required that any further investigation as to the award on the Company's claim should be confined to the alleged fraudulent exaggeration of the damages (*supra*, p. 19), but it would also make the United States internationally liable for the payments heretofore made by the President to the Company and its assigns, and cloud their title to the sums so paid to them; for the decree does not refer to the amount remaining undistributed, but "*to the money received from the Republic of Mexico for or on account of the award.*"

The absurdity of the position in which the United States would be placed by the contradictory decisions of different departments of the Government in the same matter, is made apparent in the following passages from the dissenting opinion of Mr. Chief Justice Nott (***Record***, p. 845):

> "The action of the President and the act of Congress must be construed with reference to each other, and the later, especially, with reference to the earlier. For the President to believe that the Mexican Government might be wholly exonerated, and the award be wholly and absolutely invalidated for fraud, and the claimants ultimately be held to be entitled to nothing, and the Mexican Government be adjudged entitled to have the whole of the award returned to it, and then for the President, so

believing, immediately to pay away one-third of it to these same claimants, would be foolishness. Such inconsistency can not be attributed either to the President or the Secretary of State.

"Neither can it be supposed that in a transaction, international in its character, Congress intended that the Judiciary should review the decision and action of the Diplomatic branch of the Government, and undo what it had done, and subject the President and Secretary of State in their dealing with a foreign power to the implied censure of American courts."

"Nor can it be supposed that Congress intended to create by implication a possible equitable liability on the part of the United States to Mexico.

"For if the judiciary should decide that the Mexican authorities were not guilty of the acts complained of, and that the company did not abandon the property because of those acts, and should declare the award to be void wholly and absolutely, then it must follow that when the President and Secretary of State, with the same evidence of fraud before them, paid away $240,683 to the claimants, it was a wrong done to Mexico; and the United States will then be in the dilemma of either leaving this wrong to Mexico unredressed or of making good the loss from their own Treasury. The statute does not provide for such a liability, nor contemplate it, and *nations in international controversies do not submit their own diplomatic acts to such censure.*

"It is indeed inconceivable that the United States, through their legislative branch of the Government, should have intended that the United States should come into their own courts as a litigant, there to allege and maintain that the United States, as an international power, had committed a wrong against another government."

The courts can not, as courts, give *advice* to the President concerning the proper performance of the convention of 1868 with Mexico. The judges of this court, when asked by President Washington to advise him

concerning the proper exposition of the treaties with France, answered that they considered themselves inhibited from counselling or deciding, in their official character, on *political questions, or in any question not brought before them in the recognized forms and regular progress of legal controversy.* (5 Marshall's Life of Washington, 441–443.)

In *United States* v. *Rauscher,* 119 U. S., 407, Mr. Justice Gray refused to express an opinion upon a certain point, "because not satisfied that that is a question of law within the cognizance of the judicial tribunals, as contradistinguished from a question of international comity and usage within the domain of statesmanship and diplomacy."

Congress can not "bring under the judicial power a matter which, from its nature, is not a subject for judicial determination."

Den v. *Hoboken Land & Imp. Co.,* 18 How., 272, 284.

Only judicial power can be conferred upon this court.

> "The kind of authority that is judicial in its nature relates to and acts upon rights of person or property not created by this authority, but existing under law. This authority, in specific controversies between parties, determines these rights as they thus exist, and does so at the instance of a party thereto. These qualities distinguish judicial power from what is simply executive or legislative." (Spear, *Law Fed. Jud.,* 3.)

Senator George, commenting upon this citation, said:

> "In this case (La Abra) we discard the rules of law. We leave to the court the power of its own mind, according to its own conscience, to say for the political department of the Government what is for the honor of the United States; what justice and equity require us to do. These, sir, are all political questions; they are all to be resolved by the political

> department of the Government. The Government can not call in the Supreme Court, which can only have judicial power, and invest that court with authority to say what this Government ought to do with reference to a foreign nation according to the principles of honor and justice and equity." (*Congressional Record*, Feb. 2, 1892, pp. 785, 786.)

Congress can not "authorize or require this court to express an opinion on a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties, and process of execution awarded to carry it into effect."

Gordon v. *United States*, 117 U. S., Appx., p. 697.

Congress can not "break down the barriers between judicial and administrative duties, or make courts the mere agents to assist an administrative body in the prosecution of its enquiries."

Interstate Commerce Comm. v. *Brimson*, 155 U. S., 1.

Though this occurs in the dissenting opinion, it was not on this principle that the court divided. They agreed on the principle, but differed on the question whether it had been infringed.

This is not a controversy to which the United States is a party. A controversy is but a case. "Cases" include all suits, criminal and civil; "Controversies" only those of a civil nature.

1 Tucker's Blackstone, App., 420, 421;

Mr. Justice Iredell, in *Chisholm* v. *Georgia*, 2 Dall., 419, 431, 432;

2 Story's Const., § 1674, *note* (Cooley's ed.).

> "By those terms ["Cases" and "Controversies"] are intended the claims or *contentions* of *litigants* brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress, or

punishment of wrongs." (*Smith* v. *Adams*, 130 U. S., 167.)

Here the United States can not be considered in the light of a "litigant" contending before the courts for the protection or enforcement of a *right*, or the prevention, redress, or punishment of a wrong.

If cases can be made up by act of Congress and citizens can be made parties defendant, then every vexed question involving the extent of powers of the Federal and State governments, and the boundaries of the various departments of government, may thus be settled, contrary not only to the intention of our written Constitution, but to the policy of our race from the earliest times.

In the administration of justice our courts determine what is the law of the land, and if laws conflict the courts ascertain which shall prevail. They do this *in cases* which are presented to them. "They do not sit to determine *in the abstract* the meaning of laws, but to *decide causes* between man and man." (4 Minor's Inst., 865.)

Judge Cooley says:

> "Our constitutions have provided no tribunal for the specific duty of solving in advance the questions which arise. * * * No mode has yet been devised by which these questions of conflict are to be discussed and settled as abstract questions, and their determination is necessary or practicable only when public or private rights would be affected thereby. They then become the subject of legal controversy; and legal controversies must be settled by the courts." (Const. Lim., 40, 44.)

And he cites Dr. Lieber, that—

> "when laws conflict in *actual cases* they [the courts] must decide which is the superior law, and which must yield." (Lieber, Civil Liberty and Self Government.)

When a State sues an individual in this court, as under the Constitution it is permitted to do, it must show that it "is not a party in virtue of its sovereignty;" that "it assumes and claims, not an abstract right, but a direct interest in the controversy, and that the power of this court can redress its wrongs and save it from irreparable injury." (*Pennsylvania* v. *Wheeling Bridge Co. et al.*, 13 How., 559.)

Such must be the case in order that the jurisdiction of this court may be sustained when a State is a party, and no less will be required of the United States.

> See, also, *Curtner* v. *United States* (*supra*), 149 U. S., 662, citing *United States* v. *San Jacinto Tin Co.*, 125 U. S., 273, 285, and *United States* v. *Beebe*, 127 U. S., 338, 342.

The question submitted for final determination to the Court of Claims, and to this court, by the Act of December 28, 1892, is, as we have seen, whether La Abra award was obtained in whole or part "by fraud effectuated by means of false swearing or other false and fraudulent practices," etc. But the act is entitled "An act to amend and enlarge the act approved June 18, 1878," in which original act the President was requested to examine and decide whether "the honor of the United States, the principles of public law, or considerations of justice and equity" required that La Abra award should be opened and the case retried. The preamble of the jurisdictional act brings in this question of national honor again, and avers that the Secretary of State has heretofore reported that "the honor of the United States requires that said case should be further investigated by the United States;" so that the fundamental issue here is, whether "the honor of the United States requires" that Mexico should be re-

leased from her solemn covenant with the United States in the Convention of July 4, 1868—

> " to consider the decision of the Commissioners conjointly, or of the Umpire, as the case may be, as absolutely final and conclusive upon each claim decided upon by him or them, respectively, and to give full effect to such decision, without any objection, evasion or delay whatsoever."

This is the fundamental international question that arises upon the proceedings taken on behalf of Mexico, for, as stated by Mr. Chief Justice Waite, in *La Abra Co.* v. *Frelinghuysen*, 110 U. S., 72—

> " What she asks is *the consent of the United States to her release from liability under the convention on account of the particular awards now in question.*"

That fundamental international question was pending in the Senate, where it properly belonged,* when the

*After the Senate had adopted the report of the Judiciary Committee and the House had unanimously consented to the withdrawal of the bill for submitting the question of fraud to the Court of Claims (*supra*, 22), the Mexican government renewed its efforts for an international revision of the award; and in a note of January 19, 1882, the Mexican minister (Mr. Zamacona) said to the Secretary of State (Mr. Frelinghuysen):

> "What has occurred in the matter thus far shows the propriety of adopting the most direct of those means, and the one which ought, perhaps, to have been adopted as soon as the complaint on account of fraud was presented. Such a means would be the submission of the charge of fraud to the examination of a commission similar to that which made the award in favor of Weil and of the Abra Company."

With this note Mr. Zamacona enclosed a draft of a convention (Ex. Doc. No. 103, H. R., 48th Cong., 1st Sess., 642), and subsequently Mexico's learned counsel argued before the Secretary of State, in the words of the first report of the Foreign Affairs Committee on the subject—

> "That the question presented, in so far as it relates to the payment of money under the awards received from Mexico, is *entirely within the jurisdiction and discretion of the treaty-making power under the Constitution.*" (*Ib.*, 657; Rep. 27, H. R., 45th Cong., 2d Sess., 8.)

The binding force of Mexico's submission of the question between her and the United States to the treaty-making power was

learned Chief Justice used the language just quoted; and it is this same fundamental international question which is brought here by this so-called suit in equity. And, as already observed, the jurisdictional act, while submitting the question of fraud in obtaining the award to the final determination of the Court of Claims and this Court on appeal, itself attempts to dispose of the fund in controversy by authorizing the President to return to Mexico such sum as "*such court shall decide* that such persons are not entitled *in justice and equity* to receive out of such fund."

Thus the interest which the United States has in this question is (1) of a moral sort, (2) belonging to diplomacy, and (3) heretofore decided in the proper diplomatic forum.

The Court of Claims held that—

> "The United States have *no pecuniary interest* in the result of the proceeding, but, *as a sovereign*, are interested in preserving the rights of its citizens as they may be affected by *the acts of a foreign government*, and in *the honor of the government* in not enforcing the payment of an unjust claim *against one of the great family of nations*. Aside from the question of *national duty* upon the part of the Government of the United States, the real parties in interest are the Republic of Mexico, La Abra Mining Company, and such citizens of the United States as have a pecuniary interest, by assignment, in the enforcement of the award against the government of Mexico."

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expressed by Mr. Bayard in his report of May 6, 1886, to the President, as follows (Ex. Doc. 140, Sen., 49th Cong., 1st Sess., 4):

> "It seems proper here to observe that by the voluntary negotiation of this second treaty Mexico submitted the question (whether these claims should be readjudged or no) to the treaty-making power of the United States, of which it was well known that two-thirds of the Senate was an essential part, and that *the relief sought from the effects of the former treaty could only be secured by obtaining such a constitutional majority in its favor*."

On its own showing, and the foregoing authorities, the court should have dismissed the bill for want of such interest in the United States as would support it, and because it does not present a case within the meaning of the Constitution.

II.

Neither the Court of Claims nor this Court has jurisdiction of the bill, because it seeks to review and reverse the action heretofore taken by the President of the United States in a matter of international concern exclusively within his discretion and control.

It will be observed from citations in the History of the Case (*supra*, pp. 19, 20), that upon Mr. Evarts' second report, which dealt exclusively with La Abra award, the President paid to the Company and its assigns, in September, 1879, their share of the three installments which had been received from the Mexican government, while he continued to withhold payment on the Weil award.

This second report of Mr. Evarts and the payments made by the President to the Company and its assigns, on his approval of Mr. Evarts' conclusions, are not mentioned in the statement of facts made by Mr. Chief Justice Waite in delivering the opinion of the court in *La Abra Company* v. *Frelinghuysen*, which was considered and reported in connection with *Frelinghuysen* v. *Key*, 110 U. S., 63. In the opinion (pp. 68, 69), Mr. Chief Justice quoted the whole of Mr. Evarts' first report, except the last paragraph, which reads as follows:

> "*Fourth.* It may be that, as the main imputation in the case of the La Abra Silver Mining Company is of fraudulent exaggeration of the claim in its measure of damages, it may consist with a proper reservation of

> further investigation in this case to make the distribution of the installments in hand. I have this subordinate consideration still under examination, and should you entertain this distinction, will submit my further conclusions on this point."

The Chief Justice then says, referring to the part of the report which he had cited (p. 69):

> "This action of the President was communicated to Congress under date of April 15, 1880, by his forwarding a copy of the report of the Secretary of State, which concludes as follows."

Here the Chief Justice cites the notice to Congress with which Mr. Evarts' final report closes (*supra*, p. 20). This final report, as already observed, contains his reports of August and September, 1879, with some later reflections on the general subject of international arbitration. The Chief Justice then observes (p. 69):

> "No definitive instructions were given by Congress in respect to the matter during that session, and after the close of the session payments were made on these awards by the direction of the President, the same as on the others."

From this it might be inferred that no payments had been made by the President to La Abra Company until "after the close of the session." This was the fact in the Weil case, but, as heretofore shown (*supra*, pp. 19, 20), the President had approved Mr. Evarts' fundamental distinction between the two cases, and had paid over to the Company and its assigns their share of the three installments on hand, in September, 1879.

For the Chief Justice's purpose it may not have been material to state these facts, for he was giving a history of the two cases with reference to a pending treaty for the retrial of both. But a good deal of confusion has

arisen from the intimate and long-continued association of the two cases. Mr. Chief Justice says (110 U. S., 69):

> "After President Arthur came into office he examined the cases further, and, 'believing that said award was obtained by fraud and perjury,' negotiated a treaty with Mexico providing for a rehearing."

It might be supposed that "said award" meant or included La Abra award; but it was in answer to *Key's* petition for mandamus that Secretary Frelinghuysen expressed President Arthur's belief "that said award was obtained by fraud and perjury;" while, as already observed (*supra*, p. 25), the Secretary simply demurred to the petition of La Abra.

In the body of the opinion, referring again to the first report of Mr. Evarts, Mr. Chief Justice Waite says (110 U. S., p. 75):

> "He did report officially that he had 'grave doubt as to the substantial integrity of the Weil claim' and the 'sincerity of the evidence as to the measure of damages insisted upon and accorded in the case of La Abra * * * Company.'"

But nowhere in the opinion is there any reference to the payment which the President made to the Company in September, 1879, or to his approval of Mr. Evarts' conclusion that any further investigation of La Abra award should be confined to the alleged fraudulent exaggeration of damages.

Mr. Chief Justice also says (p. 75):

> "From the statements in the answer of Secretary Frelinghuysen in the Key case, it appears that further evidence has been found, and that President Arthur, upon this and what was before President Hayes, has become satisfied that the contested decisions should be opened and the claims retried."

As matter of fact, no "further evidence" had been

found or considered by President Arthur in La Abra case, and the statement of the Chief Justice on that point must be understood as referring exclusively to the case of Weil.

President Hayes' decision, on Mr. Evarts' report, in regard to La Abra award—followed, as it was, by the payment of large sums of money to the persons concerned—could have been properly overruled by President Arthur only upon new evidence of the most convincing kind. (*United States* v. *Bank of Metropolis*, 15 Pet., 377.)

One of the reasons why the Senate rejected the convention for a rehearing may have been that it proposed to submit to a new Commission the question of Mexico's liability to La Abra Company, which had not only been decided by Sir Edward Thornton, on the disagreement of the Commissioners, in the original trial, but had again been decided by President Hayes in the examination which he had made at the request of Congress. That this was one of the grounds on which the new convention was rejected is more than probable, in view of the previous unanimous report of the Senate Judiciary Committee on this very point. (*Supra*, p. 22.)

The reference in the preamble of the jurisdictional act to Mr. Evarts' conclusions and the President's action in this case is entirely misleading. That reference is as follows:

> Whereas the Secretary of State, after investigating the charge of fraud presented by the Mexican government as to the case of La Abra Silver Mining Company, has heretofore reported that "the honor of the United States requires" that *said case* "should be further investigated by the United States, to ascertain whether this Government has been made the means of enforcing upon a friendly power claims of our citizens based upon or exaggerated by fraud,"

> but that "the executive government is not furnished with means of instituting and pursuing methods of investigation which can coerce the production of evidence or compel the examination of parties and witnesses," and that "the authority for such an investigation must proceed from Congress."

The words quoted in the preamble are taken from Mr. Evarts' *first* report, which dealt with the Weil as well as La Abra award.

By making the words "said case" refer to "the case of La Abra Silver Mining Company," the preamble applies the language of Mr. Evarts to La Abra award alone, whereas it referred to the Weil award also; and, by omitting the opening part of the paragraph, it conceals the fundamental distinction made by Mr. Evarts between the two cases; namely, that in the one case "grave doubt" was brought upon "the *substantial integrity* of the claim," and, in the other case, upon "the sincerity of the evidence as to the *measure of damages;*" or, in other words, that La Abra Company had a valid claim against Mexico, although the allowance for damages might have been excessive; while there was "grave doubt" as to the actual existence of the subject-matter of the Weil claim.

The next part of the quotation from "the Secretary of State" in the preamble of the jurisdictional act, *i. e.*—

> "'that the executive government is not furnished with means of instituting and pursuing methods of investigation which can coerce the production of evidence or compel the examination of parties and witnesses,' and that 'the authority for such an investigation must proceed from Congress'"—

is also from Mr. Evarts' first report. But no reference is made, in the preamble, to the closing paragraph of that report (*supra*, 19), which shows that Mr. Evarts still had

another question in regard to La Abra award under consideration, and intended to submit his "further conclusions" to the President if he approved the distinction taken between the two cases.

The preamble of the jurisdictional act, although it undertakes to state the substance of the action of the Secretary of State, or rather of the President, under the 5th section of the act of June 18, 1878, as the basis for further legislation by Congress, is entirely silent as to the "further conclusions" of Mr. Evarts in this case, which, as we have seen (*supra*, 19, 20), were also approved and carried into effect by the payment of large sums of money to the Company by the President.

Referring to his second report in the case of La Abra, Mr. Evarts says in his final report to the President (Ex. Doc. No. 150, Sen., 46th Cong., 2d Sess., p. 3):

> "This latter conclusion having also received your approval, and the results stated in both these reports having been communicated both to the Mexican government and the claimants, the payment was *made* upon the La Abra award of the distributive share of the installments then in hand, and payment was *withheld* of the distributive share of such installments upon the Weil award."

This is the fact that should have been stated in the preamble of the jurisdictional act—which was framed more than ten years subsequently—if any of the facts were to be recited. We have already seen that the Secretary's final report and the President's action were regarded by the Judiciary Committee of the Senate in 1880 as conclusive in this case (*supra*, p. 22).

But twelve years later the Senate was assured during the debate on the bill that the President, "aided by Mr. Evarts," had "announced that the honor of the United States and the principles of public law and justice and

equity required that this award should be set aside!" (*Congressional Record*, January 28, 1892, p. 642.) This assurance was given, in substance, again and again, and the Senate was also assured that four Presidents and four Secretaries of State had come to the same conclusion; whereas neither Mr. Blaine nor Mr. Frelinghuysen had ever made any report on the merits of La Abra award, and as late as 1888, President Cleveland, through Mr. Bayard, had reiterated, in a message to Congress, President Hayes' conclusion, as expressed by Mr. Evarts in 1879, that "the allegations of fraud in relation to La Abra award affect only the measure of damages and not, as in the Weil case, the question whether any ground of claim ever existed." (Ex. Doc. No. 109, Sen., 50th Cong., 1st Sess., p. 6.)

Not only was Congress misinformed by the preamble of the bill itself (now the jurisdictional act) in regard to Mr. Evarts' report and President Hayes' decision in this case, but Senators were also misinformed, during the debate on the bill, as we have already seen (*supra*, 6, 13, 15), in respect of other matters material to the question under discussion. There can be no reasonable doubt that the act under which this proceeding is brought was passed under a misapprehension of the facts. It may be said of it, as it was said of another act in the argument of a famous case:

> "The enactments of the act proceed on false recitals, and in the Earl of Leicester *v.* Heyden (1 Plowden, 398; and see, also, 1 Inst., 110*a*; and Priddle and Napper's Case, 11 Rep., 14*a*), it is shown that where such is the case, the subject is not concluded even by a statute; for it is there said: 'For these recitals can not be taken to proceed but upon information, and the Court of Parliament may be misinformed as well as other courts; and when they have recited a thing which is not true, it can

not be otherwise taken but that they were misinformed, for none can imagine that they would purposely recite a false thing to be true: for it is a court of the greatest honor and justice, of which none can imagine a dishonorable thing.'" (De Bode *v.* Regina, III Clark's H. L. Cas., 459.)

In his final report Mr. Evarts made it very clear that he did not think that the award in this case should be disturbed. After referring to the Commissioners as "able and eminent men, enjoying the full confidence of the governments by whom they were respectively appointed," and to the Umpire as "pre-eminently fitted for his laborious and responsible duties by his long diplomatic experience, his recognized ability, his high character, and his special knowledge of the two countries whose citizens and governments were interested in the arbitration," Mr. Evarts expresses the result of his maturest reflection, as follows (Ex. Doc. No. 150, Sen., 46th Cong., 2d Sess., p. 4):

> "Before this Commission the government of Mexico had full opportunity and ample time to present its defense, both in evidence and argument, against any claim that was submitted.
>
> "In the La Abra case *a large amount of testimony was taken on both sides, the comparison and valuation of which was within the power of the Commission; and the opinion of the Umpire shows that it was carefully considered.*"

Suppose that this statement, or the substance of it, had been stated in the preamble of the jurisdictional act?

Mr. Evarts then refers to the explicit terms in which the convention provided for the finality of the awards,*

[From Article II.]

* "The President of the United States of America and the President of the Mexican Republic hereby solemnly and sincerely engage to consider the decision of the Commissioners conjointly, or of the Umpire, as the case may be, as absolutely final and con-

and to the fact that certain claimants, citizens of the United States, were dissatisfied with the decisions of the Commission, and had appealed to their Government for relief.* On this point, Mr. Evarts says:

> "The adherence of the Government of the United States to the strict letter of its convention—that the decision of the Commissioners should be absolutely final in every case, and a complete bar to any claim arising from transactions prior to its ratification—has hitherto prevented any effort on the part of this Government to renew such discussion in favor of its citizens.
>
> "But if it be once admitted that for any reason short of an impeachment of the integrity of the Commission its proceedings can be reopened for review and its decisions for reversal, there will not be wanting numerous urgent appeals to the justice and sympathy of the Government to extend this measure of relief to many who think that their claims have been erroneously estimated or rejected." †

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clusive upon each claim decided upon by them or him, and to give full effect to such decisions, without any objection, evasion, or delay whatsoever."

ARTICLE V.

"The high contracting parties agree to consider the result of the proceedings of this Commission as a full, perfect, and final settlement of every claim upon either government, arising out of any transaction of a date prior to the exchange of the ratifications of the present convention; and further engage that every such claim, whether or not the same may have been presented to the notice of, made, preferred, or laid before the said Commission, shall, from and after the conclusion of the proceedings of the said Commission, be considered and treated as finally settled, barred, and thenceforth inadmissible." (Treaties and Conventions, 1776–1887, pp. 702, 703.)

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* Report on the petition of the Rosario and Carmen Mining Company of San Francisco, Cal. (H. R. No. 700, 45th Cong., 2d Sess.)

† It may be that one of the reasons why the Senate, in 1886, rejected the proposed convention for reopening the Weil and La Abra awards, was the want of reciprocity shown by the fact that no provision was made for rehearing any of the claims of citizens of the United States which were rejected by the Commission, although so strong a showing for such a rehearing was made by the Rosario and Carmen Mining Company of San Francisco.

Towards the close of this report Mr. Evarts said:

> "The principle of the settlement of international differences by arbitral commissions is of such deep and wide-reaching interest to civilization, and the value of such arbitration depends so essentially upon the certainty and finality of its decision, that no government should lightly weaken its influence or diminish its consideration by making its action the subject of renewed discussion. It is only in extreme cases, *where the Commission is itself charged with corruption, or where it has clearly exceeded its powers* in deciding matters not submitted to its judgment, *that prompt and cheerful acquiescence should not be rendered to its action. No such charge is here suggested.* * * *
>
> "But the awards made by this Commission were something more than the settlement of mere private claims—it was the adjustment of long-standing national differences. And if in the result more or less was added to or taken from particular awards, still if on the whole a fair and just balance has been struck, if considering all that has been given and all that has been refused the examination has been careful and the judgment impartial, *it is the interest and the duty of Governments to maintain it.**

Referring to this final report of Mr. Evarts, the Mexican Minister in Washington said:

> "The paper proceeds at some length to state the

Awards were made on claims growing out of the killing and wounding of United States citizens in an armed attack organized by a Mexican alcalde against the Company's establishment in Mexico, but the Company's own claim was disallowed. The Company charged in its petition to Congress "that certain evidence lawfully taken in, and very material to, the case, was suppressed and kept from said Commission by the Mexican government," a charge which, if established, would have laid a proper foundation for a rehearing, because the alleged fraud was extrinsic or collateral to the award, and had not been tried or triable by the Commission.

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* "All courts have recognized the wisdom of Lord Redesdale's remark, that 'it is more important that an end should be put to litigation than that justice should be done in every case.'" (*Ritter* v. *Press Co.*, 68 Mo., 458.)

> 'grounds' on which the Secretary declined to do what he did not do, *i. e.*, reopen the cases diplomatically, and these grounds were stated so strongly as to amount to an argument *against any investigation whatever.*" (Mr. Romero to Mr. Frelinghuysen, January 25, 1884, Ex. Doc. No. 103, H. R., 48th Cong., 1st Sess., p. 769).

The report of the Judiciary Committee and the action of the Senate, on the bill for referring Mexico's charges of fraud to the Court of Claims, have been referred to in the History of the Case ; also the action of the House in giving unanimous consent to the withdrawal of a similar bill, and of the report of the Foreign Affairs Committee upon it, from further consideration (*supra*, 22).

It is difficult to see how Congress could have more clearly or definitively refused to furnish the means necessary for any further investigation in this case, or to make any further representations to the President on the subject. In referring to the 5th section of the act of June 18, 1878, the Senate Judiciary Committee said :

> "In adding this section to the act providing for the distribution of the awards, it was not the purpose of Congress to pass upon the character of the claims referred to in it, as the proviso attached to said section expressly declares."

And as to Congress making any independent examination, which the committee seems to have thought Mr. Evarts had suggested, the committee said :

> "This would involve an investigation by Congress of facts of an international character, which, in the opinion of the committee, *properly belongs to the Executive Department*, and which it was the intention of the fifth section of the act of June 18, 1878, *to leave with the department.*" (Rep. No. 712, 46th Cong., 2d Sess., p. 6.)

It was on this ground that the committee reported against the bill (*supra*, 21), *i.*, *e.*, that it—

> "proposes to withdraw these two claims from the dominion of international jurisdiction and place them before a tribunal organized, and existing solely, by virtue of the laws of this country."

The eminent statesmen and jurists who were members of the committee at that time—Bayard, Carpenter, Conkling, Davis, Edmunds, Garland, Lamar, McDonald, and Thurman—knew that the Law of Nations, under which this claim had arisen, and under which it had been tried and determined by a Mixed Commission, had a jurisdiction and jurisprudence of its own, and that the proceedings of such an international court could not be nullified or reviewed in the manner proposed in the bill. This conclusion the committee stated as follows:

> "The second article of that treaty bound the two governments absolutely and conclusively by the final awards of the Commission and Umpire in all cases coming within its provisions; and it would seem right that if it is to be set aside as to any of the claims it ought to be by a new convention, in which provision should be made for doing justice to all claimants."

Here the diplomatic nature of the question is clearly suggested; *i. e.*, if the President negotiates for a review, it should be on reciprocal terms and comprehend the whole situation. Indeed, the Convention that was subsequently concluded provided (Article V)—as the jurisdictional act does not provide—for the indemnification of "any *bona fide* third parties who have, with the observance of due care and diligence, become possessed of any portion of said claims for a just and valuable consideration." (Ex. M., Confidential, 47th Cong., 1st Sess., p. 4.)

The refusal of the Senate and the House, on such explicit notice from the President, and on such deliberation in both branches, to interfere further in the matter was regarded by the Executive as final, and the Mexican government was so informed by Mr. Evarts. This appears, not only in Mr. Evarts' note to Mr. Navarro (*supra*, 23), but also in a communication from Mr. Romero to Mr. Frelinghuysen, dated January 25, 1884, in which he referred to an interview held between Mr. Evarts and Mexico's counsel in August, 1880, as follows (Ex. Doc. No. 103, H. R., 48th Cong., 1st Sess., 771):

> "Mr. Evarts, in reply, gave a detailed history of the matter, and explained the views which, he said, he and the President held as to the discretion of the Executive. He said that they interpreted the report of the Judiciary Committee and the action of the Senate on the Morgan bill as *concluding the question*, and as *notifying the Executive* that, if it declined to reopen the awards by diplomatic negotiation, *Congress would* NOT REOPEN THEM AT ALL."

The effect and conclusiveness of the action which was taken, as aforesaid, by President Hayes, in response to the request of Congress, upon the reports of Mr. Secretary Evarts, in the case at bar, are stated by Mr. Chief Justice Nott, in his dissenting opinion, as follows (*Record*, 843):

> "In 1879 the diplomatic organ of the American Government, the Secretary of State, '*upon a renewed examination of the matter as laid before him by the Mexican Government*,' * decided '*that the proper limits of the further consideration* * which the honor of the Government should prompt it to give to this award *should confine the investigation to the question of a fraudulent exaggeration of the claim.*' *
>
> "In other words, the Secretary of State decided

* These *italics* are the Chief Justice's.

that the acts of the Mexican officials to these American claimants were such as rendered the government of Mexico responsible from an international point of view.

"This decision is rendered unequivocal and unquestionable by the fact that the President, upon the recommendation of the Secretary, then proceeded to deal with the claim upon the basis that *the responsibility of Mexico for the acts and inaction of its officers was a question finally settled.* He did this by paying out a portion of the award to the claimants and withholding only enough to meet the charge of 'fraudulent exaggeration.'

"The case therefore comes into this court *with the international question determined by the Umpire and the responsibility of the Mexican government reasserted by the constitutional and proper diplomatic authority of the United States.*"

There can be no doubt that the examination and settlement of the question which the President was requested to examine and settle in respect of La Abra award, by the 5th section of the Act of June 18, 1878, were exclusively within his constitutional power.

The original claim of the Company was of international and not of municipal jurisdiction, and belonged to "the executive branch of the government, which is charged with our foreign relations." (*Williams* v. *Suffolk Ins. Co.*, 13 Pet., 420.)

In *Emerson* v. *Hall*, 13 Pet., 409, it was held by this court—distinguishing between a claim (like *Emerson's*), which involved no legal right or obligation, but simply appealed to the generosity of the United States, and a claim (like La Abra's) against a foreign government—that (p. 413):

"The demand is, in such case, *founded upon the Law of Nations*, and the obligation is perfect upon the offending government. It is true, remuneration

can not be recovered against the government by action at law; but, if justice be not done, *the government of the injured citizen*, in the exercise of its discretion, will protect and enforce his rights."

And in *Milnor* v. *Metz*, 16 Pet., 221 (referring to *Comegys* v. *Vasse*, 1 Pet., 196), this court said (p. 227):

> "That although the illegal sentences of the Spanish prize courts were irreversible, the (injured) party had not lost all right to justice, or claim, *upon principles of international law*, to remuneration; that he had a *right* both to the justice of *his own* and the *foreign government;* and that this right passed by the general assignment of the bankrupt."

In *United States* v. *Diekelman*, 92 U. S., 520, the court, by Mr. Chief Justice Waite, said (p. 524):

> "One nation treats with the citizens of another only through their *government.* A sovereign can not be sued in his own courts without his consent. * * * Hence a citizen of one nation wronged by the conduct of another nation, must seek redress *through his own government.* His sovereign must assume the responsibility of presenting his claim, or it need not be considered. If this responsibility is assumed, the claim may be prosecuted *as one nation proceeds against another*, not by suit in the courts, as of right, but by *diplomacy*, or, if need be, by war."

In *DeBode* v. *Regina*, 3 Clark's H. L. Cas., 465, Lord Chancellor Truro said:

> "It is admitted law, that if the subject of a country is spoliated by a foreign government, he is entitled to obtain redress *through the means of his own government.* But if from weakness, timidity, or any other cause on the part of his own government, no redress is obtained from the foreigner, then he has a claim against his own country."

So Vattel (b. II, ch. VI, § 71):

> "Whoever uses a citizen ill, indirectly offends the State which is bound to protect this citizen, and *the sovereign of the latter* should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation; since otherwise the citizen would not obtain the great end of the civil association, which is safety."

And Phillimore (III Inter. Law, p. 10), after saying that a State may be directly injured by a violation of the rights affecting its collective capacity, says it may also be injured indirectly—

> "by a violation of the right of the individual to whom *it owes protection in return for his allegiance.*"

President Hayes took none of his power in this matter of La Abra award from Congress. He was invested with it by the Constitution, which put him in charge of the intercourse of the United States with foreign nations. So said Mr. Chief Justice Waite, speaking for this court, in *Frelinghuysen* v. *Key*, 110, U. S., 74:

> "The fifth section, as we construe it, is nothing more than an expression by Congress, in a formal way, of its desire that the President will, before he makes any payment on the Weil or La Abra claims (awards) investigate the charges of fraud presented by Mexico. * * * From the beginning to the end it is, in form even, only a *request* from Congress to the executive. * * *
>
> "In our opinion it would have been just as competent for President Hayes to have instituted the same inquiry *without this request* as with it, and his action with the statute in force is no more binding on his successor than it would have been without."
>
> * * * * * *
>
> (P. 75): "Under these circumstances it is, in our opinion, clearly within the discretion of the President to withhold all further payments to the relators

> until the diplomatic negotiations between the two governments on the subject are finally concluded. That discretion of the executive department of the Government can not be controlled by the judiciary."

Prior to this decision, President Arthur made it plain that he was acting in the exercise of his constitutional functions in respect of these awards, by informing the Senate, in transmitting the convention for their review, that he had deemed it proper to avail himself—

> "of the authority given to the executive by the Constitution, and of which authority the act of Congress of June 18, 1878, is declarative." (Ex. M., Confidential, 45th Cong., 1st Sess., p. 1.)

If he believed that the awards should be opened and the claims retried, of what avail would be his right to negotiate with Mexico for such a retrial if he could not, pending the negotiations, withhold payment of the funds in question?

In *Boynton* v. *Blaine*, 139 U. S., 306, Mr. Chief Justice Fuller, in his statement of the case, quotes as follows from the answer of the Secretary of State to Boynton's petition (p. 311):

> "That the petition related to a matter 'which falls exclusively within the powers and competency of the President of the United States and this respondent, as subordinate to him and subject to his direction and control, and which doth in nowise fall within the jurisdiction and competency of the judicial department of the Government of the United States; and that it would involve an interference of the said judicial department with a matter which is exclusively committed by the Constitution to its coordinate, the executive department, for this honorable court to take cognizance of the matter of the relator's petition.'"

The learned Chief Justice said, in delivering the

opinion of the court, that it had no disposition to recede from the principles announced in *Frelinghuysen* v. *Key*, and added, after quoting the passages hereinbefore cited (p. 323):

> "The new convention was then pending in the Senate, and it was clear that the discretion of the executive department of the Government to withhold all further payments to the relators until the diplomatic negotiations between the two governments were finally concluded, could not be controlled by the judiciary."

If President Arthur had constitutional authority to negotiate the convention for a rehearing, and to withhold payment pending the negotiations, President Hayes had constitutional authority to adopt Mr. Evarts' conclusions in respect to La Abra award, and to make payment, as he did, to the Company and its assigns. And this action can not be reviewed by the courts. La Abra Company stands here invested and shielded with the Secretary of State's report and the President's decision that it had a valid claim against Mexico and that "the proper limits of the further consideration which the honor of the Government should prompt it to give to this award should confine the investigation to the question of a fraudulent exaggeration of the claim."

Upon the conclusiveness of such action and the relation which the Secretary of State sustains to the President, Mr. Chief Justice Marshall, in *Marbury* v. *Madison* (1 Cr., 63), observed:

> "By the Constitution of the United States the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and *is accountable only to his country in his political character and to his own conscience.* To aid him in the performance of these duties he is authorized

to appoint certain officers, who act by his authority and in conformity with his orders.

"In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still, *there exists and can exist no power to control that discretion.* The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, *the decision of the executive is conclusive.* The application of this remark will be perceived by adverting to the act of Congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, *can never be examinable by the courts.* * * *

"The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which *the executive possesses a constitutional or legal discretion,* nothing can be more perfectly clear than that *their acts are only politically examinable.*

As said by Mr. Justice Gray, speaking for the court, in *Jones* v. *The United States,* 137 U. S., 202–224:

"The duty of the judiciary is to decide in accordance with what the President in the exercise of a discretionary power confided to him by the Constitution and laws, has actually done."

And the learned justice cited *Williams* v. *Suffolk Ins. Co.,* 13 Pet., 417, in which it was said:

"Can there be any doubt that when the executive branch of the government, which is charged with our foreign relations, shall, in its correspondence with a foreign nation, assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this

> view it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong; it is enough to know that in the exercise of his constitutional functions he has decided the question."

Not only is the President's action in the exercise of his constitutional authority definitive and final, but the authority itself is exclusive, and he can not delegate it or refuse to exercise it when the proper occasion arises.

It was in maintenance of this principle that the Judiciary Committee made the following observations (a part of which has already been quoted) in regard to the suggestion in Mr. Evarts' final report, that Congress should now decide whether a further investigation should be made:

> "In the investigation that has taken place in the State Department, under the authority of the fifth section above quoted, no suggestion appears in the report of the Secretary 'that the honor of the United States, the principles of public law, or the considerations of justice and equity require that this case should be retried,' but, on the contrary, *after stating considerations of public policy which would seem to forbid the reopening of the case,* the questions of honor, principles of public law, and considerations of justice and equity are referred to Congress to decide. *This would involve an investigation by Congress of facts of an international character which, in the opinion of the committee, properly belongs to the executive department, and which it was the intention of the fifth section of the Act of June 18, 1878, to leave with the department.*"

On the exclusiveness of the constitutional authority vested respectively in the legislative, executive, and judicial departments of the Government, and the danger of encroachment by any on the province of the other, Mr.

Justice Miller said, for the court, in *Kilbourn* v. *Thompson*, 103 U. S., 168, 191:

> "It is also essential to the successful working of this system that the persons intrusted with power in any of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall, by the law of its creation, be limited to the exercise of the powers appropriate to its own department, and no other."

So in the *Sinking Fund Cases*, per Mr. Chief Justice Waite (99 U. S., 718):

> "One branch of the Government can not encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

And Mr. Justice Story, in *Martin* v. *Mott* (12 Wheat., 19):

> "Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of these facts."

See, also, *Luther* v. *Borden*, 7 How., 1, followed in *Den* v. *Hoboken Land and Imp. Co.*, 18 How., 272; *White* v. *Hart*, 13 Wall., 646; *Phillips* v. *Payne*, 2 Otto, 130; and *United States* v. *Lee*, 106 U. S., 196.

In this last-named case, the court said:

> "It has been uniformly held that * * * questions, the decisions of which * * * might involve war or peace, must be primarily dealt with by those departments of the Government which had the power to adjust them by negotiation, or to enforce the rights of the citizen by war.
>
> "In such cases the judicial department of this Government follows the action of the political branch." * * *

In a similar controversy with Venezuela, growing out of the Caracas awards, Congress itself, after discussion and deliberation in both Houses, extending through a period of ten years, took final action in accordance with these principles. An act had been passed on the 25th of February, 1873, declaring—

> "That the adjudication of claims by the convention with Venezuela of April 25, 1866, * * * is hereby recognized as final and conclusive, and to be held as valid and subsisting against the Republic of Venezuela." (17 Stats., 477.)

Five years later—June 20, 1878—this was repealed, with a proviso—

> "That nothing herein, or in the act hereby repealed, shall be construed as an expression of any opinion on the part of Congress in respect to the validity of any awards made under said convention, or as to the propriety of a negotiation by the Executive of a new convention in respect to the same." (20 Stats., 241.)

Shortly prior to this—April 24, 1878—the House Committee on Foreign Affairs, in a report on the petition of the Rosario and Carmen Mining Company for a rehearing of their claim against Mexico, had reported as follows:

> "The committee having recently had under consideration House Resolution No. 39, looking to the suspension of payments of two of the claims decided (Weil and La Abra) by Sir Edward Thornton, Umpire, under the treaty aforesaid, have submitted to the House a report (H. R. 27, 45th Cong., 2d Session.) As the same questions arise under that resolution as are presented by the petition of claimants, the committee beg leave to refer to and adopt the reasons and conclusions contained in that report as and for their report in this matter.

"They here repeat, as they there state, that, in their opinion, *this House has no jurisdiction of the matter referred to them by the petitioners.*" (Rep. No. 700, H. R., 45th Cong., 2d Sess., p. 2.)

Bills having been subsequently introduced for a review of the Venezuelan awards by the Court of Claims (S. 799 and 893), the Senate Committee on Foreign Relations reported, on the 23d of March, 1882, by Mr. Windom:

"That, in our opinion, the Court of Claims *can not be clothed with jurisdiction to modify or annul the action of the Commission* organized under the provisions of the treaty of April, 20, 1866, between the Government of the United States and Venezuela.

"The committee are also of opinion that *the Department of State has full power and authority touching the distribution of the moneys paid in under the awards made by said Commission, and they therefore recommend the indefinite postponement of said bills.*" (Rep. No. 311, Sen., 47th Cong., 1st Sess.)

About a year later—May 3, 1883—Congress passed a joint resolution requesting the President to open diplomatic correspondence with the government of Venezuela for the appointment of a new Commission, on the ground that since the dissolution of the Caracas Commission—

"*serious charges, impeaching the validity and integrity of its proceedings,* have been made by the Government of the United States of Venezuela, and also charges of a like character by divers citizens of the United States of America, who presented claims for adjudication before that tribunal * * * and the evidence * * * tends to show that such charges are not without foundation." (22 Stats., 643.)

A convention was subsequently concluded between the two governments (December 5, 1885) and the claims were readjudicated by a new Commission in 1889–'90.

This was the proper course to follow, and it was followed during the same period—1882–'86—in the case at bar, by the negotiation of the new convention, which was rejected by the Senate (*supra*, 25), but Mexico (or rather, perhaps, General Slaughter) did not accept the result, and renewed the appeal to Congress.

From what has been shown, under this head, it is manifest that the only question left open by President Hayes for further investigation was, in the language of Mr. Evarts' first report, "the sincerity of the evidence as to the measure of damages insisted upon and accorded in the case of La Abra * * * Company."

In his second report, as already stated, Mr. Evarts said that on a renewed examination of the matter as laid before him by the Mexican government he was—

> "confirmed in the opinion that *the proper limit of the further consideration which the honor of the Government should prompt it to give to this award should confine the investigation to the question of a fraudulent exaggeration of the claim.*"

On this branch of the discussion it is to be observed (*a*) that the same question of exaggeration was raised before the Commissioners and Umpire, and determined by them under the Convention; (*b*) that it was afterwards examined, in 1886, by the Foreign Affairs Committee of the House on the "newly-discovered evidence," and decided in favor of the Company; (*c*) that there was evidence (which Mr. Chief Justice Nott seems to have overlooked) sustaining the Umpire's allowance for the ores on the patio; and (*d*) that equity will not relieve against an award for mere excess of damages.

(*a*) The question of fraudulent exaggeration of damages was raised and determined at the original trial. At the

close of his argument before the Commission the agent for Mexico, Mr. Avila, said (*Record*, 422):

> "It is not to be doubted that the government of Mexico is under no obligation to pay all that is claimed by the Company, * * * because when the expense incurred for the working of the mines, the losses which it is claimed were sustained, and the profits which it was hoped to realize are compared with the enormous amount claimed, the exaggeration of the Company's pretensions becomes perfectly evident."

The Mexican Commissioner, Mr. Zamacona, after showing how the claim had been increased by more than a million dollars after its presentation to the Department of State, said, in his opinion adverse to the claim:

> "But when, as in the present case (item No. I), two hundred and forty-one thousand seven hundred and ninety-one dollars is charged as the whole amount expended in the working and for all the responsibilities incurred in carrying on the business, this amount and the original cost constitute their total value, and all which can rationally be demanded for the property." (*Record*, 387.)

This was substantially the view taken by the Umpire, for, instead of allowing the $3,000,000 claimed by the Company for the value of the mines, he allowed only for actual expenditures and for the ore which remained on the "patio" when the Company abandoned its property, as appears from his award (*Record*, 9):

> "The Umpire is of opinion that the claimants should be reimbursed the amount of their expenditures, and also the value of the ores extracted which they were forced to abandon, with interest upon both these sums. He can not consent to make any award on account of prospective gains, nor on account of the so-called value of the mines."

(*b*) The Foreign Affairs Committee of the House made

a thorough examination of this question of exaggeration, and in the report made by Mr. Daniel, August 5, 1886, stated their conclusion, as follows:

> "Undoubtedly some of the items of the large claim asserted against Mexico by the La Abra Company are shown to have been exaggerated and others unfounded. But this remains when all that can be reasonably said in favor of the interference proposed has been considered—*that there was ample evidence before Sir Edward Thornton that is not impugned by any new evidence to have sustained and warranted his award;* that the award did not embrace damages on account of the items that have been surcharged or apparently falsified; that that award was far below what was claimed—that it was far below in amount the damages which, in the opinion of unprejudiced witnesses, the claimant Company suffered; that it did not embrace speculative damages; that the mistreatment of the Company by Mexican officials and people is proved by their own testimony; and that, conceding all that by reasonable intendment the newly-discovered evidence proves, the award made had ample foundation in testimony not successfully impeached, and was not in excess of fair compensation for losses suffered according to that testimony." (Rep. No. 3474, H. R., 49th Cong., 1st Sess., pp. 3, 4.)

(c) Mr. Chief Justice Nott, however, came to the conclusion that the allowance of two items of the award was obtained from the Umpire by fraud and perjury.

The two items in question were—"$17,000 derived from reduced ores and $100,000 for ores extracted and abandoned by the Company at its works in Mexico."

> "These two items (says the learned Chief Justice) must have rested upon the testimony of Exall, the superintendent, and Granger, the bookkeeper. The one testified that the abandoned ores must have amounted to from 900 to 1,000 tons, which 'would have yielded the Company, above the cost of reducing them to silver, in my opinion, one million of

dollars;' and the other testified that about 7,000 cargas, 'a little over 1,000 tons,' had been taken out and were abandoned. There were other affidavits cumulative, perhaps corroborative, but it can not be supposed that a man of Sir Edward Thornton's ability, sagacity and experience attached any importance to the *ex parte* affidavits of ignorant Mexican miners taken before an American consul, affidavits which, in the opinion of those who gave them, could have been invested with the obligations of neither law nor religion.

"Granger had already contradicted himself when the case was before the Umpire, having sworn on the 6th of October, 1871, 'that the greater part of the ore taken out by the Company is still on the patio of the hacienda, and that it is good for nothing.' As this testimony of his was not believed by Sir Edward Thornton, and as he expressed regret that the books of the Company had not been produced, it is manifest that he came to a reluctant conclusion upon these items of the award, and depended wholly upon Exall. This becomes more apparent when we find that he adopted as the amount of money derived from reduced ores the exact figures given by Exall—$17,000. In a word, if the testimony of Exall and Granger drop out of the case, these two items of the award must fall." (*Record*, 849.)

The item of $17,000 obtained from a reduction of ores and spent in the business, seems to have been considered false and fraudulent by Mr. Chief Justice Nott, because he accepted as true the allegation of Mr. Attorney General in the bill (*Record*, 18)—

> "That the investment of said Company derived from reduction of its ores was only $420.09, instead of $17,000, as sworn by the said Exall and allowed by said Umpire in his said award."

The learned Chief Justice was of opinion, at one time, that Exall's ledger corroborated the allegation just quoted

from the bill, but when his attention was drawn to the stipulation in regard to the returns from the mill, as shown by that exhibit (*Record*, 745, paragraph 3), he cancelled what he had said on that point (*Record*, 849, 850, *erasure*), and left his final statement (*ib.*, 851)—that the allowance should be reduced to $420.09—not only unsupported by evidence, but disproved by the account book which was produced by the complainant. The amount shown by the book, however, is scarcely $4,000; while Sloan, a witness for Mexico, who had been employed as a clerk by the Company, testified that the Company "had taken out a little less than $6,000 in silver." (*Record*, 120.) But Exall says in his explanatory affidavit of May 1, 1878 (*Record*, 670):

> "Much of the bullion extracted by me was not minted but was sent by me, without the knowledge of anyone at the hacienda but myself, some of it to New York and some of it to San Francisco. This secrecy was necessary, because if it was known it would have been liable to seizure as contraband, and to avoid the possibility of a discovery of the fact no entry of it was ever made in the Company's books, but the proceeds were put into the Company's business as stated in my deposition."

The evidence shows that some very rich ore had been mined and was at Exall's disposal. During Bartholow's superintendency ore so rich was taken out of "La Luz" that it was put up in gunny sacks as fast as mined and *stored in the wareroom.* (*Record*, 210.) This was more than a year prior to the completion of the reduction works, and the evidence shows that if this stock of rich ore was reduced at all, it was reduced by Exall, for there was only one trial of the mill before he became superintendent, and the ore used in that trial was taken from the piles on the patio.

There was also another rich find, in regard to which

De Lagnel testified in the Senate investigation as follows (Rep. No. 2705, Sen., 50th Cong., 2d Sess., 54):

> "I remember the wild excitement among the miners, because when the ore was brought down you could see the gold in streaks as large as a big diaper-pin head, little pellets of gold along like fine shot, so as to leave a line of gold. * * * I took it for granted that that was rich ore."

And in his letter of May 7, 1867, to Garth, Exall says (*Record*, 266):

> "While at the La Abra I picked up two or three pieces of ore which was then being taken out. Made no selection. The evening before leaving the hacienda for this port I assayed the several pieces. The assay was *better* than previous assays of any ore on the patio, giving me $378 in silver and a large percentage in gold. * * * The labor from which this ore was taken is improving, and the vein widening ever since it was first started on."

From the foregoing two things are clear (1) that whatever may have been realized from the reduction of the ores, it was far in excess of the amount named by Mr. Chief Justice Nott; and (2) that the evidence does not so conclusively impeach the Umpire's allowance for this item as to warrant its annulment or reduction.

Inasmuch as the Umpire did not allow for the estimated value of the mines or prospective profits, but only for actual expenditures, and for the ore that had been extracted and abandoned by the Company, it was with reference to this last item that the charge of exaggeration was pressed upon him in the motion made by the Mexican government for a rehearing. In denying this motion the Umpire said:

> "In the case No. 489, '*La Abra Mining Company* v. *Mexico*,' the Mexican agent appeals to authorities as to the value of ores, who, he states, are at Philadel-

phia. Why were not the statements of these gentlemen—of whose existence the Umpire was not aware, and to whom he had not access—reduced to evidence and produced before the Commission?" (Ex. Doc. No. 103, H. R., 48th Cong., 1st Sess., 127.)

Now, it can be shown to a demonstration that when the Umpire allowed $100 per ton for 1,000 tons of ore on the patio—$100,000—he did not rely exclusively or mainly upon Exall's testimony, for Exall testified that the pile was worth $1,000,000; while Cole, an unimpeached witness, himself a mine owner, who had personal knowledge of the subject, testified (*Record*, 57):

"That he knows the fact that the said La Abra Company had taken out and left upon the ground, in April, 1868, large quantities of rich silver ore, as he believes, from 1,000 tons to 1,500 tons, and that nearly all of the richest and most valuable of the same were taken off by Mexicans, and carried away from said mines, after Superintendent Exall had been forced to abandon the same in March, or the early part of April, 1868.

"That deponent has frequently *seen* them packing off said ores from the works of said Company, in sacks upon mule backs, in March, April and May, 1868, and that they must have taken off largely more than $250,000 worth of the said ores, independent of, and above the cost of reducing the same to bullion.

"Deponent believes the said Company, at the time they abandoned the same, had out about 1,200 tons of said silver ores, which would have yielded said Company, in his opinion, not less than from $100 to $1,000 per ton of pure silver."

The learned Chief Justice says that Granger testified, on the 6th of October, 1871, "that the greater part of the ore taken out by the Company is still on the patio of the hacienda, and that it is good for nothing;" but that was more than three years after the abandonment, and,

of course, it was only the best of the ore that was carried away. It will be noticed that the Umpire adopted Cole's minimum valuation of $100 per ton, and fixed the quantity at 1,000 tons, although Jesus Torres and Francisco Acosta, witnesses for Mexico, estimated the quantity at "from 10,000 to 14,000 cargas"—1,500 to 2,000 tons. (*Record*, 137, 138.) These witnesses said that this was "heaped up and covered over with about three or four hundred cargas of real ore in the hacienda of Tayoltita."*

But this was not the only evidence before the Umpire. Charles Bouttier, a professional miner and chemist, testified that he was at Tayoltita in the winter of 1867–1868, and that, with a view of purchasing the Company's mines, "in connection with other gentlemen who wished to form a company to work them," he tested very thoroughly the "quality and supply of the ores of La Abra, La Luz, Rosario, and Talpa."

Mr. Bouttier continued (*Record*, 75):

> "The result of my examination of these mines was that I found La Abra almost an inexhaustible mine of rich ore, which, however, will require a large capital to work it properly, as it should, in my judgment, be tunnelled. * * * The ore I tested averaged more than that average ($600 per ton.) I also tested the other mines named in the same way, and the ores of the others tested beneficiated me at the rate or average of about $475 per ton."

This witness also mentions "the large piles of rich ore" which the Company "had taken out," and which he "*saw there*, piled up back of the hacienda."

This was not the testimony of "ignorant Mexican miners," to whom Mr. Chief Justice Nott refers, but of experts who testified from personal knowledge. The

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*On this statement, see Bartholow's testimony (*Record*, 169).

"ignorant Mexican miners" were examined for Mexico and not for the Company. Cole was a citizen of the United States, resident in Mexico, a ranchman and miner of large means and experience, and Bouttier was a Frenchman by birth who had lived for twenty years in the United States, and at the time he testified was a resident of Mazatlan, where, or elsewhere in Mexico, he had resided for "about sixteen years last past."

Nor should it be forgotten that there was a mass of testimony before the Umpire — testimony still unimpeached—to the effect that great quantities of the Company's ores where stolen. The Umpire might well conclude that if the ores had been worthless or so poor as the witnesses for Mexico asserted, the ore-piles would not have been plundered in that way. The Umpire had also before him the orders of the local magistrates, addressed to the Company's superintendent, to let the unemployed Mexican laborers work the mines—which, of course, they would not have desired to do if they had believed that the ores would not pay for working.

It is also to be observed that Exall was not in the service of the Company, and had no connection with it, or interest in its claim, when he testified on its behalf in 1869 and 1874. (*Record*, 33, Ans. to Ques. 17; *ib.*, 160, Ans. to Ques. 34.) If he testified falsely, and if it had been on his testimony that the two items in question were allowed by the Umpire, nevertheless they could not be disturbed in this proceeding, because the jurisdictional act does not allow the award to be impeached in whole or part, unless "obtained by fraud effectuated by means of false swearing, or other false and fraudulent practices *on the part of the said* * * * *Company*, or its *agents, attorneys*, or *assigns*."

But even if the Umpire's allowance for the ore, which was made upon the testimony of such witnesses as Cole

and Bouttier, who have not in any way been impeached, and against whom no charge of bribery or corruption has been made, could be shown to have been excessive, the fact would remain that on account of Mexico's improper and prolonged efforts to subvert the award in its entirety, the Company and its assigns have not only been put to an enormous expense in the defense of their rights since 1877, but they have been deprived of their share of the installments paid by Mexico since 1882—expenses and loss of interest far in excess of the whole amount of the allowance in question.

(*d*) Equity will not relieve against an award for mere excess of damages. The allowance must be so grossly unreasonable and so evidently unjust as to raise a presumption of corruption or partiality on the part of the arbitrator. It was to this settled principle that the Judiciary Committee of the Senate referred, when they said, refering to Mr. Evarts' report in this case:

> "It will be seen from this report, with respect to La Abra mining claim, the principal ground of complaint is exaggeration of damages, and upon that question *it does not appear that any fault whatever attaches to the Commission before whom it was examined, nor to the Referee by whom it was affirmed.*" (*Supra*, 22.)

The rule is stated as follows in Kerr on *Fraud and Mistake*, Bump's ed., 291, *note:*

> "An award estimating damages or the value of property will not be set aside in equity unless the estimate is so enormously disproportioned to the case proved as to strike every one that there must have been corruption and partiality." (*Rand* v. *Reddington*, 13 N. H., 72; *Bumpass* v. *Webb*, 4 Port., 65; *Beverly* v. *Reynolds*, Wythe, 105; *Van Cortlandt* v. *Underhill*, 2 Johns. Ch., 339.)

In the last-named case (*Van Cortlandt* v. *Underhill*, *supra*), Mr. Chancellor Kent discussed this question at great length and with the thoroughness and learning for which he was so justly distinguished.

He says (p. 358):

> "I come now to the real foundation of this controversy, and that is the sum at which the mill and its appurtenances have been valued. * * *
>
> "My impression from the proof is that the property here was considerably overvalued, and I have been induced to examine the case with more than ordinary attention to see if there was any well-established fact that would, upon sound principle, justify me in interfering with the award. But if I have been unable to discover any sufficient grounds it is then my indispensable duty to adhere to the settled doctrines of the court rather than make them bend to a case of individual hardship. * * *
>
> "If every award must be made conformable to what would have been the judgment of this court in the case it would render arbitrations useless and vexatious, and a source of great litigation, for it very rarely happens that both parties are satisfied.
>
> "The decision by arbitration is a decision of a tribunal of the parties' own choice and selection. * * * They (the courts) have only looked to see if the proceedings were honestly and fairly conducted, and if that appeared to be the case they have uniformly and universally refused to interfere with the judgments of the arbitrators."

The learned Chancellor then reviews the cases, commencing with *Greenhill* v. *Church* (3 Ch. Rep., 49), as early as 1635. He also refers to *Cavendish's Case* (1 Ch. Cas., 279), in which Lord *Nottingham* held that "if parties without the court refer their differences they choose their own Judges, and the court would not relieve against the award, unless for corruption, going beyond authority, or the like;" *Brown* v. *Brown*, A. D. 1683 (1 Vern., 157),

in which Lord Keeper *North*, although admitting that the amount awarded—which was denounced as "outrageous"—"was near the value of the estate for life," felt bound to dismiss the bill; *Earl v. Stocker* (2 Vern., 251; Hil., 1691), in which the court set aside an award on one of the excepted grounds of interest and corruption in the arbitrators. Other cases within reach of the exception were referred to, as that of *Pitt* v. *Dawbra*, where the arbitrators had promised to hear witnesses, and had made their award without having heard them; and the *Butcher of Croyden's Case*, in which the arbitrator was not indifferent between the parties.

> "In all these cases (says Chancellor Kent) the award was set aside on the ground of misconduct, partiality or corruption, and not on the ground of error or mistake; and in *Croyden's Case* the Lord Keeper declared that he did not proceed barely because the damages were excessive, though the award, as it is stated in 1 Vern., 157, was for £300, which was an enormous sum for that day, and was merely to repair, as the award expressed it, the honor of a man who was called a bankrupt knave."

After reviewing other cases and citing the decisions of Lord *Hardwicke*, Lord Chief Justice *Eyre*, and Lord *Eldon*, Chancellor Kent sums up as follows:

> "In finishing this review of the most material chancery decisions on awards, I think we may safely conclude that the law is as well settled on this as on any other subject whatever. The conclusiveness of the judgment of arbitrators has received the uniform sanction of the court for a series of ages. The rule is not now to be shaken or disturbed; it is founded in so much reason and public convenience as not to be confined merely to the Court of Chancery, but to have met with the general approbation of mankind."

It need not be said that all the reasons in favor of this

doctrine as affecting municipal awards apply with equal or greater force to awards made in settlement of international claims.

Chancellor Kent also reviews the American cases, citing *Parker* v. *Avery*, Kirby, 353, decided in Connecticut soon after the Revolution, in which it was declared by the court to be unprecedented there to go into the merits of an award, and that the reasonableness or unreasonableness of it did not affect its validity, so that there be no misbehavior or corruption in the arbitrators. He also cited an early case in South Carolina—*Mulder* v. *Cravat*, 2 Bay, 370—in which the judges all agreed that too easy an ear ought not to be lent to complaints against awards made by judges of the parties' own choosing, and who possess all the powers of courts of law and equity in the given case. He also said that the same rule had been repeatedly declared in the courts of Virginia, and that the reasons for setting aside an award, according to the cases there, must appear on the face of it, or there must be misbehavior in the arbitrators, or some palpable mistake, citing 1 Wash., 14, 158; 1 H. and Munf., 67; 2 H. and Munf., 408. In one of the late cases (2 Munf., 8), he observed that it was laid down by Judge Brooke that—

> "whether the value of the land was ascertained upon correct data can not now be questioned, unless misbehavior in the arbitrators, or some one of them, were proved, or a palpable mistake in the amount, and not in the manner of making up the award was shown."

The learned Chancellor then takes up the civil law, in which, he says, citing authorities, that the conclusiveness of an award is asserted as strongly as in any of the English decisions. After quoting from *Vinnius*, he says:

> "The case here stated is the very one we are considering. The parties choose arbitrators to fix the

price of the mill, and they must abide by the price declared, be it too high or too low, unless fraud can be shown. This award would be declared binding by Vinnius, sitting under the civil law; it must be equally so under the law of this country."

In *Burchell* v. *Marsh*, 13 How., 351, the same doctrine is expressed by this court, per Mr. Justice Grier, as follows:

"Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes it should receive every encouragement from courts of equity.

"If the award is within the submission and contains the honest decision of the arbitrators, after a fair and full hearing of the parties, a court of equity will not set it aside for error in fact or law. A contrary course would be a substitution of the judgment of the *Chancellor* in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation. * * *

"The damages allowed for the alleged oppression of Burchell and the ruin of his business, may seem large to some, while others may think the sum of four or even five thousand dollars as no extravagant compensation for such injuries. *It may be admitted that on the facts appearing on the face of the record, this court could not have assessed damages to so large an amount nor have divided them so arbitrarily between the parties; but we can not say that the estimate of the arbitrators is so outrageous as of itself to constitute conclusive evidence of fraud or corruption.*"

Such, also, in principle, is the Law of Nations.

So Vattel, B. II, ch. XVIII, § 329:

"When once the contending parties have entered into articles of arbitration, they are bound to abide by the sentence of the arbitrators; they have engaged to do this; and the faith of treaties should be religiously observed."

He then continues, referring to a possible case in which the decision might be such as could never have been contemplated in the submission:

> "If, however, the arbitrators, by pronouncing a sentence evidently unjust and unreasonable, should forfeit the character with which they were invested, their judgment would deserve no attention; the parties had appealed to it only with a view to the decision of doubtful questions. Suppose a board of arbitrators should, by way of reparation for some offense, condemn a sovereign State to become subject to the State she has offended, will any man of sense assert that she is bound to submit to such decision?"

But even in such a case, he says:

> "If the injustice is of small consequence, it should be borne for the sake of peace; and if it is not absolutely evident, we ought to endure it, as an evil to which we have voluntarily exposed ourselves. *For if it were necessary that we should be convinced of the justice of a sentence before we would submit to it, it would be of very little use to appoint arbitrators.*"

But where the decision is clearly within the submission the parties must abide by the award, unless it is shown indubitably that the arbitrators have been corrupt or partial. On this point Vattel says (*ib*):

> "If, then, their sentence be confined within these precise bounds *the disputants must acquiesce in it. They can not say that it is manifestly unjust, since it is pronounced on a question which they have themselves rendered doubtful by the discordance of their claims*, and which has been referred as such to the decision of the arbitrators. Before they can pretend to evade such a sentence they should prove, by incontestable facts, that it was the offspring of corruption or flagrant partiality."

In his great work on *International Law*, Sir Robert Phillimore says (Vol. III, pp. 3, 4):

> "It should be observed that if any arbitrator be appointed, the terms of the appointment will of

course limit his authority, and if his award exceed or be inconsistent with those limits, it will be altogether null.

"Otherwise, the *jus inter gentes* is well expressed in the opinion of Ulpian, as it stands incorporated in the Roman Law:—'*Si se subjiciant alicui jurisdictioni, et consentiant, inter consentientes cujusvis judicis, qui tribunali præest, vel aliam jurisdictionem habet, est jurisdictio.*' * * *

"The sentence once given is binding upon the parties whose own act has created the jurisdiction over them. The extreme case may indeed be supposed, of a sentence bearing upon its face glaring partiality, and attended with circumstances of such evident injustice as to be null."

Rivier, in his recent work, "*Principes du Droit des Gens*" (Vol. II, p. 186), states the rule adopted by the Institute de Droit International (Art. 27), as follows:

"The arbitral sentence is void if the treaty is void, or if it is shown that any of the arbitrators exceeded his authority or was guilty of corruption, or if there was any material error."

The same rule has been upheld and applied by the diplomatic branch of this Government, which, while holding that an award might be reviewed by a new International Commission for fraud or collusion on the part of the arbitrators, maintained that this could not be done for exaggeration of damages. Thus Mr. Frelinghuysen, in his report to the President on the Caracas awards, said:

"An examination of the charges formulated by Venezuela against the remaining seven awards shows that they are objected to for various reasons, as, for instance, that the party agreed that his claim was not to be the subject of an international reclamation; that the contracts were not made by the lawful government of Venezuela; that there was no just foundation for the claim; *that the claims were grossly exaggerated;* that the claimant had not ex-

hausted all his remedies in the local courts, etc. *As all such defenses were open to Venezuela in the Commismission, the time for advancing them has now past.*" (Ex. Doc., No. 208, H. R., 47th Cong., 1st Sess., 4, 5.)

Mr. Evarts in his final report in this case, which was styled by the Mexican Minister an argument against any investigation whatever (*supra*, 57), referred to this rule when he said—

> "It is only in extreme cases, where the Commission is itself charged with corruption, or where it has clearly exceeded its powers * * * that prompt and cheerful acquiescence should not be rendered to its action. No such charge is here suggested."

And twelve years later, the Chairman of the Senate Committee on Foreign Relations, who has since been Secretary of State, said, in expressing his opposition to the jurisdictional act, and his dissent from the report in its favor (*Record*, 452):

> "Only this I can say, that I have always regarded the arbitration of this case as final and conclusive, not to be reopened, and that it is better in any aspect of the real facts in respect to the claim that *the award should be exactly carried out.* I have thought and still think that it is more important to give force and effect to an award solemnly made than to scratch over the ashes to find imperfections or insufficiency of proof upon which the award was founded. Unless convinced otherwise I will vote for insisting upon the award."

The distinguished Senator also said in his place in the Senate, February 2, 1892 (*Record*, 452, 453):

> "I believe it (La Abra) a case of exaggerated damages, but it seems to me the government of Mexico ought to have taken the pains to have established these facts, which they could have done. With all the power of a government there, and being per-

fectly familiar with the local matters, they should have made their defence before Sir Edward Thornton and thus avoided this controversy.

"As they did not do it, I believe it would be better for the public interests and better for an example of international arbitration that the award should stand and be executed in good faith."

III.

Neither the Court of Claims nor this Court has jurisdiction of this suit, because it requires a collateral inquiry to be made into the merits of an international award rendered by a tribunal of exclusive and final jurisdiction.

"The Mixed Commission (said Mr. Seward in his instructions to the United States Commissioner in the arbitration under the Convention of April 25, 1866, with Venezuela), when duly organized, will constitute *an international tribunal;* that is to say, *a Court of the highest order known to Public Law,* and will have complete jurisdiction of all questions of fact or of law which may come before it in virtue of the treaty between the two governments." (Mr. Seward to Mr. Talmage, November 15, 1867, Mis. Doc. No. 30, H. R., 45th Cong., 2d Sess., *Appendix,* p. 6.)

The Court of Claims said in the Meade case (2 Ct. Claims, 224):

"The Commission established by the Spanish treaty of 1819 (8 Stats., 252) was a *special tribunal* having exclusive jurisdiction of claims arising under the treaty, and *no other court* can correct its mistakes or revise its decisions." *

* This was a domestic board of Commissioners, whereas the United States and Mexico were represented in the Mixed Commission under the Convention of July 4, 1868, and the Umpire, Sir Edward Thornton, accepted that position with the consent of Her Britannic Majesty's Government.

With that definition this Court agreed (9 Wall., 725), saying—

> "That the decision of the Commissioners appointed by the United States dismissing the claim was final and conclusive, and bars a recovery on the merits in that court."

This Court, by Mr. Justice Story, had previously said, in respect to the same Commission (Comegys *v.* Vasse, 1 Pet., 193):

> "The object of the treaty was to invest the Commissioners with full power and authority to receive, examine, and decide upon the amount and validity of the asserted claims upon Spain for damages and injuries. Their decision, within the scope of this authority, *is conclusive and final.* If they pronounce the claim valid or invalid, if they ascertain the amount, their award in the premises *is not re-examinable. The parties must abide by it as the decree of a competent tribunal of exclusive jurisdiction.* A rejected claim can not be brought again under review in any judicial tribunal; *an amount once fixed is a final ascertainment of the damages or injury. This is the obvious purport of the language of the treaty.*"

In its opinion overruling the demurrer, the Court of Claims, by Mr. Justice Weldon, said (*Record*, 337):

> "Against the protestation of the party entitled to the residue of the award, the question of its fairness and integrity is *collaterally* submitted to this court, and we are called upon, in effect, *to pass judgment upon the binding force of the finding and award of a Mixed Commission sitting to decide upon international claims between independent and co-ordinate nations.*"

The complainant had seen this difficulty, and had therefore contended, as stated by the court in its opinion (*Record*, 340), that—

> "The law, bill, and decree, if in pursuance to the prayer, do not attack the integrity of the award, and

> that the award, as such, is above and beyond their powers and purposes; that the award, as a matter of law, is unaffected by the proceedings authorized by the act of our jurisdiction."

The conclusion of the court that the award was collaterally attacked should have led to a dismissal of the bill for want of jurisdiction.

There can be no doubt that the jurisdictional act did submit the question of the fairness and integrity of the award collaterally to the court; because the court could not examine and determine the question submitted by the act—*i. e.*, whether the award was obtained in whole or part "by fraud effectuated by means of false swearing or other false and fraudulent practices on the part of the Company, its agents, attorneys, or assigns,"—without retrying the case on the merits. At all events, this is what the court has done.

> "The proper mode of invoking equitable relief is by original bill in the nature of a bill of review." (STORY'S *Eq. Pl.*, § 426.)

But the court held that this was not an original bill in the nature of a bill of review, to set aside the award for fraud, and that the rules applicable to such a suit were not to be applied here, and therefore it could not escape the conclusion that the award was attacked collaterally by this anomalous proceeding.

Referring to the Throckmorton case, which, with others to the same effect, had been cited by the Company's counsel, the court said (*Record*, 354):

> "The rule of law announced in that case is but a repetition of the doctrine of many cases, and *were this an ordinary proceeding in review of the finding and judgment of a court, such cases would be applicable;* but the *trial* and *investigation* provided by the law of 1892 is *not subject to the rules applicable to proceedings in chancery to set aside a judgment or decree.*"

The original claim was docketed in the Commission as "*La Abra Silver Mining Company* v. *Mexico.*" This was in accordance with the purpose and provisions of the convention which was negotiated for the settlement of "all claims ON THE PART OF *corporations, companies, or private individuals, citizens of the United States.*"

If this proceeding had been a suit by Mexico against the Company to annul the award for fraud, the question of its fairness and integrity would have been raised in a direct proceeding—supposing that a court of the United States would have taken jurisdiction of an international matter of this sort. But as Congress, in the opinion of the Court of Claims, has determined that the preliminary question whether the new evidence on which Mexico relies could have been produced by the exercise of due diligence at the original trial, is not to be raised in this proceeding, and that it "is not subject to the rules applicable to proceedings in chancery to set aside a judgment or decree," it follows that the proceeding is anomalous, and hence it is that in the examination and decision of the one particular question which the act submits to the court, the award is inquired into collaterally. The suit is not *Mexico* v. *La Abra Company et al.*, to open the award and retry the claim, but *The United States* v. *La Abra Company et al.*, "to determine (in the words of the jurisdictional act) whether the award made by the United States and Mexican Mixed Commission in respect to the claim of the said * * * Company was obtained as to the whole sum included therein, or as to any part thereof, by fraud effectuated by means of *false swearing* or other false and fraudulent practices on the part of said * * * Company, or its agents, attorneys or assigns, and in case it be so determined to bar and foreclose all claims in law or equity on the part of said * * * Company," etc.

Now, in determining this particular question and making such a decree, the court found itself obliged to retry the original case. The court said (*Record*, 818):

> "Having decided that under the law of 1892 the court has jurisdiction * * * to inquire into the fairness and justice of the award, we now reach that part of the case when it is necessary for *us* to *determine* from the testimony, first, whether the respondent was compelled by threats or acts of the Mexican officials or people to abandon the mines, as stated in the memorial, on or about the 20th of March, 1868, and, if so, what was the reasonable value of the property so abandoned," etc.

And again (*Record*, 820):

> "The theory we have adopted is that the examination under the statute of 1892 properly embraces the inquiry as to *whether the Company was compelled to leave Mexico because of the acts of the people and the authorities;* and, if so, the value of the property abandoned and sacrificed."

That was the *whole case* before the Commissioners and Umpire.

The Court of Claims has retried that case, and while it has not decided that any particular testimony on which the United States Commissioner or the Umpire relied was perjured or false, but, on the contrary, has affirmed the genuineness of Mora's and Soto's orders and the credibility of Chavarria's testimony, it has shown as clearly as possible that it has not been impressed in the same way with the evidence as was the Umpire, and has come to a different conclusion from his on substantially the same proofs. This is how the court concluded when drawn into a consideration of the merits—as it says—"collaterally," but it said at an earlier stage, when defining its jurisdiction (*Record*, 817):

> "We are not sitting as a court of review to deter-

> mine whether, upon the proof offered and admitted, the award is to be sustained or justified by the weight of testimony, but whether it was procured by false testimony or fraudulent practice upon the part of the respondent. We are not to determine the question as to whether the Umpire found against the weight, or great weight of the evidence, but whether the award is the result of fraud and perjury."

The failure of the court to designate in its opinion or decree—just as Mr. Attorney-General failed to designate in his bill—any particular fraud with the precision and circumstance required by the law in such cases is discussed elsewhere, and is mentioned here merely to show that, as a result of this anomalous proceeding, instituted as a suit in equity, with an appeal to this court, a claim arising under the Law of Nations has been retried and an award of an International Commission, which inherently and by treaty is final and conclusive, has been called in question and divested of the verity which it imports—"collaterally." There can be no question about the fact, for the court that rendered the decree as the result of this retrial says, referring to the jurisdictional act, that the question of the fairness and integrity of the award "*is collaterally submitted to this court.*"

The legislature can not grant a new trial of a domestic case, because that is a judicial function; still less can it direct a court "to pass judgment upon the binding force of the award of a Mixed Commission" * * * "collaterally."

> "It is a general rule at common law that parties and privies to a judgment may not impeach it collaterally for fraud." (12 Am. & Eng. Ency. of Law, 147 S., and cases cited.)

In *Michaels* v. *Post*, 21 Wall., 398, this Court said:

> "Domestic judgments, under the rules of the com-

> mon law, could not be collaterally impeached, or called in question, if rendered in a court of competent jurisdiction (*Lord* v. *Chadbourne*, 42 Me., 429). It could only be done directly by writ of error, petition for new trial, or by bill in chancery." See, also, *Noble* v. *Union River Co.*, 147 U. S., 174.

The Court of Claims overruled the demurrer and assumed jurisdiction entirely upon certain expressions in *Boynton* v. *Blaine*, 139 U. S., 306. This was stated by Mr. Justice Weldon (*Record*, 351), as follows:

> "In the view which we now take of the decision in the case of *Boynton* v. *Blaine*, we eliminate from the consideration of this case all speculation upon the subject of whether the United States is a sovereign or a trustee; whether the Company has a vested right of property in the fund, or award, and whether the claim is in abeyance or in esse, and *place our conclusion as to the legality of the act of 1892 upon what is said in that case.*
>
> "The court, in the conclusion of the opinion, held, in substance, that so long as the political branch of the Government had not lost control of the fund, that the claimant, as between itself and the Government, was not in a position to insist on the conclusiveness of the award; that by the act of 1878 that control was expressly reserved, and that such control was to be kept until *a retrial* could be had in an international tribunal, if the two Governments so agreed, *or in a domestic tribunal if Congress so directed.*"

To this it may be said—(1) that the statement of the learned Chief Justice was OBITER, and (2) that the Court of Claims has misconstrued its meaning.

The learned Chief Justice, in delivering the opinion of this court in that case, stated precisely what it decided and the ground on which that decision was founded. A petition had been filed in the Supreme Court of the District of Columbia by an assignee of a portion of the

Weil award for *mandamus* directing the Secretary of State to pay him his share of the funds received from Mexico, which petition was dismissed by the court below, and an appeal was taken to this court. The petitioner relied upon the Act of Congress of June 18, 1878, and contended that the conditions on which payment in the Weil case was suspended, by section five of that act, had been decided in his favor, but the Secretary, in his answer, said—

> "that grave charges and representations impeaching the integrity of the evidence on which the award in the case of the said Weil was made have been brought to the notice of the Government in a way to command its earnest attention, and that it is *the desire of the President to have the said charges and representations investigated so soon as Congress shall have provided the means for doing so.*"

And furthermore—

> "That while the said charges and representations are pending the President of the United States hath concluded that payment of the money now demanded by the relator should be withheld, and that *the course thus taken by the President was in harmony with section 5 of the act of June 18, 1878.*" (*Boynton* v. *Blaine*, 139 U. S., 310, 311.)

Upon this fundamental issue, as to the effect of the act on which the petitioner relied, Mr. Chief Justice FULLER said (pp. 320, 321):

> "Payment of the Weil award had been withheld by the President after an investigation, but the case had not been retried and decided in a manner agreed upon by the United States and Mexico, nor had Congress otherwise directed. How, then, could Weil, or his assignee, the relator, *insist upon payment under the first section of the act in disregard of the limitation imposed by the fifth?* On what principle could it be held that the duty was imposed upon

> the Secretary *to pay an award by an act expressly providing that payment should not be made in a specified contingency, which had occurred?* What power had he to do the thing demanded in virtue of legistion which forbade it to be done?"

This then—whether the relator's petition for mandamus could be sustained on the Act of June 18, 1878—was the issue on which the case depended, and on which it was decided.* That the case decided nothing more than this, and that a different issue might have been presented to the court, the learned Chief Justice made clear, as follows:

> "The *political trust* with which every government is charged, as respects its own citizens, was not the ground of relator's contention, but he relied on the Act of 1878 as giving him the right to enforce the alleged obligation by judicial proceedings, and it was essential to the maintenance of his position that the record should bring him within its terms." (P. 321.)

Now, it is respectfully submitted that there is nothing in this decision to justify or support a grant of "full jurisdiction" by Congress to the Court of Claims to "finally adjudge" the particular question submitted to it by the act, or to pass judgment upon the fairness and integrity of the award collaterally.

The learned Chief Justice does indeed speak of a *re-*

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* This decision is not at all inconsistent with the decision of this court in *Frelinghuysen* v. *Key*, that the fifth section of that act, from beginning to end, was merely a *request* addressed to the President, without which his constitutional power in the premises would have been as complete as with it. The appellants admit that the Secretary of State can not be compelled to make distribution if the President authorizes the answer that was made for him in *Boynton* v. *Blaine*; *i. e.*, that he desires "to have the said charges and representations investigated so soon as Congress shall have provided the means for doing so"—with a view, of course, to a negotiation with Mexico for a retrial, if in his opinion the honor of the United States or the principles of public law may so require.

trial in a domestic tribunal, if so directed by Congress, but he also says, referring to the investigation which Congress requested the President to make before making payment in the Weil and La Abra cases, that—

> "This inquiry might have resulted in reopening the awards as between the two nations, or in *such* re-examination in a domestic forum as would demonstrate whether the honor of the United States required a different disposition of the particular amounts in question."

But this would be for the information, and not for the control, of the Executive.

In his statement of the case (p. 315), the learned Chief Justice refers to the suggestion of Mr. Evarts in his first report, that—

> "the Executive had not the means of instituting and pursuing methods of investigation which could coerce the production of evidence or compel the attendance of witnesses, and the authority for *such* an investigation must proceed from Congress."

But Mr. Evarts did not mean, and Mr. Chief Justice did not say, that the political or diplomatic issue—"whether the honor of the United States required a different disposition of the amounts in question"—should be "finally adjudged" by the Court of Claims, nor that the final judgment of a special tribunal sitting under the Law of Nations should be set aside and the Company and its assigns be forever barred and foreclosed of all claims and demands upon the amount awarded, in collateral proceedings by any municipal court whatsoever.

The only particular method of "such re-examination" indicated in the opinion (p. 317) is the one suggested by Mr. Secretary Bayard, under the 12th section of the Tucker Act. This, he said, would be "a *proper judicial*

investigation of the claims in question." The findings of the court under this section would have been reported to the Department of State, for its information, and, as decided by this Court (*in re* Sanborn, 148 U. S., 222), *would not have operated as a final judgment.*

The opinion in *Boynton* v. *Blaine* affirms the opinion in *Frelinghuysen* v. *Key,* and the latter asserts in the most unmistakable terms that the final decision of the question involved is with the President, under the Constitution, and that any interference with him by Congress in the discharge of this constitutional duty would be an encroachment. Congress might have furnished him with the means of making a further investigation in 1880, if it had chosen, but it can not take the case out of his hands and determine the question involved and control his discretion by a final decree.*

IV.

The appellate jurisdiction of this court, if it exists, involves and requires a review of the facts.

It is true that the jurisdictional act of 1892 permits an appeal to this court from a final decree of the Court of Claims "under the rules of practice which govern appeals from said court;" but we contend that this language does not refer to the rules of practice prescribed by this Court applicable to cases arising under the general jurisdiction of the Court of Claims. Those rules, adopted at the December Term, 1865, expressly

*The Court of Claims asserts full jurisdiction over the funds in the custody of the Secretary of State, as well as the question of fraud in obtaining the award. The opinion mentions "the sum of $403,030.08" as "now the amount *subject to the decree of this litigation,*" and says that "the statute contemplates that the effect of the decree be confined to the money on hand, and to that extent it partakes of the character of a proceeding *in rem.*" (*Record,* 841.)

relate to "cases decided in the Court of Claims in which by *the* act of Congress such appeals are allowable." *The* act here referred to is the Act of March 3, 1863 (12 Stats., 765), and not *an* act of Congress in a special case. (McClure *v.* United States, 115 U. S., 145.)

There are also rules of practice laid down in the *decisions* of this Court. Congress must be presumed to have had knowledge of these rules, as enunciated in *Harvey* v. *United States*, 105 U. S., 671, and *United States* v. *Old Settlers*, 148 U. S., 427, in which it was held that in a suit in equity this court must review the facts as well as the law.

Rule V, regulating appeals from the Court of Claims, requires "each party" to submit requests for the finding of facts by the Court of Claims, but in this suit neither the Government nor the appellant made any such requests. Neither considered the rule applicable and the requests, in view of the opinion of the court (*infra*, 101), would have been futile.

It is idle to deny that this was meant to be a proceeding in equity. The Government proceeded, as is required in equity cases, by filing a bill, and this bill is entitled by Mr. Attorney General "in equity." The act conferred on the court the right to make interlocutory and *final decrees*, and to enforce them by *injunction*—powers only conferred upon a court in the exercise of equity jurisdiction. Moreover, the act authorizes, and the bill prays, the court to *bar and foreclose* all claim of La Abra Company, a power unknown to a court of law. The bill also seeks, and the answer makes, *discovery*.

In the opinion overruling the demurrer Mr. Justice Weldon said:

> "Against the protestation of the party entitled to the residue of the award, the question of its fairness and integrity is collaterally submitted to this court,

and we are called upon, in effect, *to pass judgment upon the binding force of the finding and award of a Mixed Commission sitting to decide upon international claims between independent and co-ordinate nations.*" (*Record*, 337.)

If an award of such a tribunal could be reviewed in a domestic court it could only be by a suit in equity.

Further on the learned Justice referred to the jurisdictional act, which he said—

> "from its declared purpose subserves a great public interest in relieving the Executive branch of the Government in the discharge of a very important duty toward the Republic of Mexico and *the disposition of a trust recognized by the act of 1892 in a citizen of the United States.*" (*Record*, 339.)

And again:

> "Congress, by the act of 1892, *declared a trust* in the remaining funds for the purpose of determining the question of fraud urged by the Republic of Mexico, and conferred on this and the Supreme Court the judicial power of deciding that question." (*Record*, 352.)

Equity takes notice of and protects especially trusts and equitable estates.

> "Trusts are the original creatures of the court of chancery * * * and to remedy breaches of trust was the first reason of the constitution of that court." (Lord Chief Baron Gilbert, *Forum Romanum* (Tyler's ed.), 253; Story's *Eq. Juris.*, 13th ed., sec. 60, p. 58; 2 Spence's *Juris. Court of Chancery*, 25.)

Another ground of equitable jurisdiction, suggested by Mr. Attorney General in his bill, was stated by the court, as follows (*Record*, 352):

> "The Act of 1892 having recognized a claim on the part of the Company, *equitable* in its character,

> and Mexico, in subordination to the judgment of the Commission, having questioned the justice of the claim, the Government finds itself in the condition of a *trustee*, having in its possession money to which it lays no claim as property, files this bill in the form of a bill of *interpleader*,* or to *quiet title*, to have judicially determined its duty with reference to the money as property."

Asserting the equitable nature of its jurisdiction under the act, the court sums up as follows (*Record*, 356):

> "The directions of the statute as to the character of the decree seem to be without doubt, and as the court in the trial of the cause is *in the exercise of* EQUITY *powers*, it would find no difficulty in entering such a decree as will carry out the purpose of the statute."

These citations are made to show that in the opinion of the court the jurisdiction conferred upon it by the act was unmistakably equitable. But the appellants do not concede that the "trust" under which the President holds the funds in question arises from the jurisdictional act, or the Act of 1878, but from the terms of the treaty under which the claim of the Company was submitted for final determination to the Mixed Commission. Indeed, the "trust" has its root still deeper, to wit, in the Company's ownership or right of property in the claim for which the award was rendered, and which is now merged in that final international judgment.

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*This can not be compared to a case of interpleader, for in such a case the stakeholder must be indifferent, whereas in this case the stakeholder alleges in the bill that the claimants obtained the award by fraud; nor does the court dispose of the fund as in a case of interpleader, for the act itself does that, or rather, it undertakes to authorize the President to do it, in conformity with the decision of the Court of Claims or of this Court on appeal. Nor would an interpleader lie where one of the parties claiming the fund had obtained a judgment in his favor. The judgment could not be impeached in that way.

In announcing its conclusion on this point and justifying itself for omitting its usual findings of fact (which had not been requested in this case by either party), the court said, in its final opinion on the merits (*Record*, 838, 839):

> "This being a proceeding *in equity*, this court is not called upon to settle the facts by the finding of ultimate facts for the consideration of the Supreme Court, but the whole record is transmitted to that court, and the case is to be determined in the Supreme Court upon the law as it shall be adjudged and upon the facts as they shall be found by the decision of the Supreme Court.
>
> "That would be so *in a case of this kind* arising under the ordinary jurisdiction of the Court of Claims, but it is especially true from the *provisions of the statute* giving us the special jurisdiction to determine the issues of this proceeding. The statute provides for a *decree* and not for a money judgment."

Then, citing the case of *Harvey* v. *United States* (*supra*), the court concludes as follows:

> "All the testimony being before the Supreme Court for the purpose of settling ultimate facts from such testimony, we have confined the limits of this opinion to questions of law and the determination of the ultimate fact, which is, whether the Company was compelled to abandon its mines because of the acts of the people of Mexico and the Mexican authorities."

Judged by all the tests recognized by the authorities, it is clear that Congress intended that the suit which it directed the Attorney General to bring should be—as he has framed and entitled the bill—a suit "in equity.' (1 *Story Eq.*, § 25 *et seq.*; 2 *Id.*, § 960 *et seq.*; 4 Minor Inst., 333.)

If it has any resemblance, as claimed by complainant, to an interpleader, this, too, forms one of the ordinary

subjects of equity jurisdiction. (Mitford Eq. Pl., 104, 125.)

> "Congress has always used these words ("appeal" and "writ of error") with a clear understanding of what is meant by them, namely, that by a writ of error only questions of law are brought up for review, as in actions at common law, while by an appeal, except when specially provided otherwise, the entire case on both law and facts is to be reconsidered." (*Cunningham* v. *Neagle*, 135 U. S., 1, 42; 2 Foster, Fed. Prac., 2d ed., 964.)

To the same effect is Mr. Spear, in his work on The Law of the Federal Judiciary (pp. 259, 260), where he gives a history of the methods of appeal to this Court, commencing with the distinction taken in the Constitution between law and equity, and describing the practice of this Court from the beginning, with references to the various statutes and decisions on the subject.

In delivering the opinion of the court in *United States* v. *Old Settlers* (*supra*), Mr. Chief Justice Fuller, referring to *Harvey* v. *United States*, 105 U. S., 671, 691, said (p. 464):

> "On appeal to this court from a decree rendered under this act [for Harvey's relief] it was contended on the part of the United States that the appeal could not be heard, because there was not in the record 'any finding by the Court of Claims of the facts in the case, in the nature of a special verdict, with a separate statement of the conclusions of law upon such facts.' But this court held, through Mr Justice Blatchford, that 'the rule in regard to findings of fact has no reference to a case like the present, of equity jurisdiction conferred in a special case by a special act; and in such a case, where an appeal lies and is taken under section 707 of the Revised Statutes, this court must review the facts and the law as in other cases in equity, appealed from other courts.'"

The learned Chief Justice also said (p. 465):

> "We regard the language of the act of Congress as manifestly used with the intention that equity powers should be exercised in the disposition of the case. It was upon this view that we directed the *certiorari* to issue, and in arriving at our conclusions * * * we have considered and determined the case for ourselves upon an examination of the entire evidence."

There can be no doubt that if this Court entertains the appeal in this proceeding, the facts as well as the law must be reviewed.

V.

If this appeal is dismissed for want of jurisdiction the decree of the Court of Claims will be null and void, and unavailable for any purpose whatever.

It was argued by the learned counsel for the complainant on the respondent's demurrer below that if the Court of Claims should hold that it could not constitutionally render a decree in the terms of the jurisdictional act it might nevertheless proceed, by virtue of the act, to make findings of fact for the information and guidance of the President. On this point the learned counsel remarked (29 Ct. Clms., 466):

> "But even if the act of 1892 does not vest judicial power in the courts, the Court of Claims may still proceed under it. The act requires the Court of Claims to find certain facts. This Congress may do for its own information and action, or for that of the President. If the decree (of injunction against defendants) which the act directs to be entered upon a finding for the plaintiff can not be constitu-

tionally rendered, that does not make the whole act unconstitutional and void. The provisions for the injunction and for the appeal are separable from the rest of the act, and the Secretary of State *may* distribute the money or the President *may* return it to Mexico, *accordingly* as the court find for plaintiff or defendants on the question of fraud."

Referring to this suggestion, the court said, in overruling La Abra Company's demurrer:

"Inasmuch as this opinion holds that the statute is constitutional in its entire scope, it is not necessary to discuss the question as to whether it is good to a certain extent, and would authorize the finding upon the part of the court as to the fact whether a fraud was committed in procuring the award from and through the Commission." (*Record*, 355.)

But where Congress attempts to invest an inferior court with judicial power in the sense of the Constitution, and it is held by the higher court that the act is unconstitutional, the decree below is utterly void, and the judges can take no action whatever as commissioners or extra-judicially in the premises. And where a tribunal is authorized by legislative act to adjudicate individual rights, subject to an appeal to a higher court, and it is judicially determined that for any reason the appeal can not be entertained, the decree below can have no force or effect whatever for any purpose, and it is as if the act itself had never been passed. (*Mayor of Nashville* v. *Cooper*, 6 Wall., 250.) In such a case it must be presumed that the legislature would not have passed the act in question without the right of appeal. But in the case at bar the presumption is unnecessary, for the result of the debate in the Senate on the amendment to strike out the third section (*supra*, pp. 26, 27) shows that it was regarded as an essential part of the act.

"While it was conceded that Congress might confer

upon that court (the Court of Claims) extra-judicial powers, yet the court was of opinion that *this could not be held to have been done by the act authorizing the institution of this suit, since it is therein provided that whatever judgment might be rendered, whether for the complainants or defendants, might be appealed to the Supreme Court*, whose jurisdiction, as defined by the Constitution, is strictly judicial, and could neither be enlarged nor diminished by legislative authority." (Thayer, Cases on Const. Law, Part 12, p. 191, *n.*, citing *Gordon* v. *United States*, 2 Wall., 561; Taney, C. J., 117 U. S., 697, App.; *In re Sanborn*, 148 U. S., 222; Fuller, C. J. (for the Court), in *United States* v. *Old Settlers*, 148 U. S., 466.)

The rule is that the proceedings of an inferior tribunal, acting under an unconstitutional law, are void and not merely erroneous. *Ex parte Siebold*, 100 U. S., 376, 377, in which this court, by Mr. Justice Bradley, said:

"An unconstitutional law is void and no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and can not be a legal cause of imprisonment."

In a note to *United States* v. *Ferreira*, 13 How., 52–54, by Mr. Chief Justice Taney, inserted by order of the court, he gives the decision of this court in the unreported case of *United States* v. *Yale Todd*, because (he says)—

"It shows the opinion of the court upon a question which was left in doubt by the opinions of the different judges, stated in the note to Hayburn's case. And as the subject is one of much interest, and concerns the nature and extent of judicial power, the substance of the decision in Yale Todd's case is inserted here, *in order that it may not be overlooked, if similar questions should hereafter arise.*"

Grouping the two cases of Hayburn and Todd, the learned Chief Justice stated the results, as follows:

> "1. That the power proposed to be conferred on the Circuit Courts of the United States by the Act of 1792 was not judicial power within the meaning of the Constitution, and was, therefore, unconstitutional, and could not lawfully be exercised by the courts.
>
> "2. That as the act of Congress *intended to confer the power on the courts as a judicial function, it could not be construed as an authority to the judges comprising the court to exercise the power out of court in the character of commissioners.*
>
> "3. That money paid under a certificate from persons not authorized by law to give it (*i. e.*, the judges who had acted as commissioners) might be recovered back by the United States."

Thus it appears that the action of judges taken as commissioners, under an act of Congress "intended to confer the power on the court as a judicial function," is destitute of any legal effect whatever and is absolutely null and void.

Substantially the same account of the decision in these two cases and of the proceedings that led to them was given by Mr. Chief Justice Marshall in the famous case of *Marbury* v. *Madison*, 1 Cr., 171, 172, nearly half a century earlier.

VI.

The Court of Claims erred in not dismissing the bill when it found as matter of fact that the Mexican Government, by the exercise of the same diligence which it exercised after the adjournment of the Commission, could have obtained the so-called newly-discovered evidence, and used it while the claim was pending before the Commission.

On this point the Court of Claims said (*Record*, 841):

> "At the time the Secretary of State made the order of distribution Mexico had exercised the diligence which resulted in the procurement of the books of the Company, *and which might have been procured for use before the Joint Commission by the exercise of like diligence.*"

There can be no doubt that this is so. It appears from the evidence that when Exall abandoned the Company's mines and works at Tayoltita he left the Company's books of account and papers at the hacienda, and that they were never outside of Mexican jurisdiction from that time (late in February or early in March, 1868), until they were sent by Granger to Gaona in December, 1877, and January, 1878 (*Record*, 576, 577), and a small selection of the mass was forwarded to the Mexican Legation at Washington to be used in Mexico's appeal, through General Slaughter, from the State Department to Congress.

Granger was examined as a witness on six different occasions while the Claims Commission was in session—twice for the Company, May 14 and May 23, 1870 (*Record*, pp. 46–51; 64, 65), and four times for the Mexican government, August 23, 1871; October 6, 1871; July 23,

1872; and July 25, 1872. (*Record*, 111–113; 119, 120; 128, 129, 130.)

On his first examination he produced five documents, marked Exhibits V, W, X, Y, and Z (*Record*, 54), as to the last of which he said (*ib.*, 47):

> "A letter was received by Colonel De Lagnel, superintendent of said Company, from Colonel Valdespino, of the Republican Army of Mexico, *which came into my possession as clerk of the Company, and which letter has never since its receipt passed out of my possession;* and I now present the same to the counsel, marked 'Exhibit Z.'"

As to Exhibit X, he said (*ib.*, 49):

> "I remember the order very well, as I received it as *clerk of the Company*, and, after showing it to the superintendent, Mr. Exall, I filed it away with some other papers of the kind, and subsequently turned it over, together with two or three others from Judge Guadalupe Soto, to the attorney of said La Abra Company."

He also said (*ib.*, 50) that the hacienda had "long since been sacked of books, receipts, invoices, and other papers."

This testimony, which was taken May 14, 1870, while the Commission was in session, and *five years before its decision in this case*, put the Mexican authorities upon inquiry as to the Company's records, and pointed the way to their immediate discovery. Indeed, it was from this same man that the Mexican government, some eight years subsequently, obtained the Company's books and papers, and submitted a small selected portion of them, as "newly-discovered evidence," to our Government.

But although Granger was examined on four different occasions by the Mexican authorities subsequent to his examination for the Company, and while the Claims Commission was in session, and the testimony which he

had given for the Company at Mazatlan in May, 1870, was well known to the Mexican authorities in Washington, where the Commission sat, and in Mexico, where most of the testimony was taken, not a single question was put to him touching the Company's books and papers. The subsequent conduct of the Mexican officials in regard to these records (*supra*, 12–15) shows that they did not want to have them produced until the Commission had adjourned and a selection from them could be made and used as a means for attacking the award and recovering the whole or part of any amount that might be awarded.

But furthermore, one of the most important papers in "the newly-discovered evidence," *i. e.*, Exall's "autograph letter" of February 26, 1868, to Granger, putting him in charge of the Company's property,* was translated into Spanish by Sundell for Granger's use at San Dimas "a few days after Exall left"—that is, late in February or early in March, 1868—(*Record*, 542, answer to cross-question 10), and a judicial translation of the same document was made in the court of first instance at that place, upon Granger's petition, September 27, 1873. (*Ib.*, 300, 301.)

It was in this same court at San Dimas that so much of Mexico's defensive testimony was taken, and in which Granger himself had been four times examined as a witness for the Mexican government in opposition to the Company's claim. The Claims Commission was then in session, and no action was taken by the Commissioners upon the Company's claim until May, 1875—more than eighteen months subsequent to the aforesaid translation of Exall's letter—when they rendered conflicting opinions, and the case went to the Umpire.

* For Exall's explanation of that letter, see his affidavit of May 1, 1878. (*Record*, 670.)

This famous letter showed on its face that it had been subjected to moisture and pressure, thus suggesting a press-copy book, and the book itself which had been in Granger's possession since March, 1868, was *seen by Sundell in Granger's house at San Dimas several years after Exall's departure.* (*Record*, p. 538, cross-questions 39, 43; also p. 544, answers 39–43.) That Sundell had seen both the "autograph letter" and the press-copy book long prior to the Commissioners' disagreement and the Umpire's decision in this case, appears from his answer to the 55th cross-question (*Record*, 545), in which he says that he "never saw or heard of any books, letters, or papers belonging to the Company's records, *other* than the letter-press copy book and the letter of February 26, 1868, from Exall to Granger during the first five years of Exall's departure from Tayoltita." He therefore saw the book and the letter between March, 1868, and March, 1873. But we can fix the time when he saw the book more precisely. He tells us that he returned to San Dimas in October, 1871 (*Record*, 544, 546), while Granger was still a "resident of that place." (*Record*, 119.) It must have been about this time that Sundell saw the book, for Granger subsequently moved from San Dimas and was living at San Vicente in July, 1872. (*Record*, 125.) From March, 1868, to October, 1871, would be "several years after Exall left," and it is to be remembered that the Umpire's award in this case was not rendered till December 27, 1875.

Sundell and Granger were always on friendly terms. (*Record*, 543, Ans. 21.) At that time (October, 1871), when Sundell returned to San Dimas, Granger was living with Cecilia Jimenez, the stepdaughter of one of the local Mexican magistrates, Gaudalupe Soto (*Record*, 543, Ans. 28; 559, Ans. 21), and had a month or two previously changed sides as a witness, and given testimony

in court at San Dimas on behalf of the Mexican government. (*Record*, 111–113.) Sundell seems also to have been on friendly terms with the Mexican authorities, but they never took his testimony until August 9, 1877, although, with the exception of a short absence in 1872, he had been living continuously at San Dimas since October, 1871. And it was through Granger and in consultation with him that he was examined *ex parte* at Mazatlan, nearly two years after the Umpire's award had been rendered. (*Record*, 545, Ans. 50.) But, even then, although he had translated the "autograph letter" twice—the first time as early as March, 1868—no question was asked him about the letter-book or other records of the Company, until he was examined in this suit, October 2, 1894, when it appeared that he had seen the book in Granger's house at San Dimas, and Granger had told him that it was the Company's letter-book, while the Commission was in session, more than twenty years previously. Nor was a single question touching the Company's books and papers put to Granger in any of his four examinations as a witness for Mexico, although he had produced several documents in his testimony for the Company, and it was known to the authorities and the whole community that he had been employed as the Company's bookkeeper, and had remained at the Company's hacienda with Soto, for a short time, at least, after Exall's departure. Thus, for their own purposes, the Mexican authorities deliberately refrained from any attempt to find or produce the records of the Company which had been left in Mexican territory by the Company's superintendent and were, in part at least, in possession of a friendly witness, and continually within reach of the process of their courts until delivered, as aforesaid, in December, 1877, and January, 1878, by this same Granger to the Mexican district attorney, Gaona.

The Court of Claims was unanimous in its conclusion that the Mexican government could have produced the so-called newly-discovered evidence by the use of due diligence at the original trial, as appears from the opinion of the majority of the judges already cited (*supra*, 107), and the following, on that particular point, from the dissenting opinion of the learned Chief Justice (*Record*, 847, 848):

> "On the 14th day of May, 1870, Granger, as a witness for the Company, produced before the United States commercial agent at Mazatlan the five orders from Mexican civil and military officers which constituted the vital evidence of the Company's case in the hearing before the International Commission. These papers necessarily came from the office of the Company, and were a part of the mass of papers left in Granger's possession by Exall, and of which he was thenceforth the only custodian.* The Mexican government was thereby informed that papers of the Company existed, and that there was a person exercising a power of custody over them, and that that person was a resident within the territory of Mexico. This testimony, however, was *ex parte*. The Mexican government had no opportunity to cross-examine, and if the case had stopped at that point, would be free from the imputation of laches or neglect.
>
> "But fifteen months afterwards, August 23, 1871, Granger, who had twice testified for the Company, reversed his policy and his testimony, and became a witness for the government of Mexico. On the 6th of October, 1871, he was a second time called as a witness by the Mexican government. On the 23d of July, 1872, he for the third time testified for the government, and on the 25th of July he gave his testimony for the fourth time. In this last deposi-

* The local Mexican magistrate, Soto, whose stepdaughter, Cecilia, lived with Granger, took possession of the Company's hacienda, and resided there, after Exall's departure, for several years. (*Record*, 52, answer 4; 165, answer 17; 185, near foot of the page.)

> tion, in answer to the question, 'What position or employment did you have in the mining establishment of Abra?' he replied, 'At first I was a dependent or clerk; afterwards, when the superintendent—Carlos H. Exall—left, I remained in charge as his representative.' Therefore, before the case was submitted to the International Commission, *it was apparent upon its record that papers and documents of the Company existed in Mexico, and that they were in the hands of a friendly witness.*" *

But although the court found unanimously that Mexico could have obtained "the newly-discovered evidence" in time to submit it to the Claims Commission by the use of the same diligence as was exercised after the Commission had adjourned, nevertheless it did not dismiss the bill, because of opinion that Congress had relieved the Mexican Government from liability for its laches in the presentation of its original defense. On this point Mr. Justice Weldon says (*Record*, 818):

> "The question of diligence upon the part of Mexico, is not, as we conceive, before this court; that question was passed upon by Congress in the passage of the law giving us jurisdiction to determine the controversy on the questions of fact, subject to the rules of evidence applicable to the character of the inquiry arising upon the record."

We submit, with all respect, that the court was mistaken. The jurisdictional act, section 2 (*Record*, 329), directs the court "in *all* respects to proceed in said cause *according to law* and the rules of said court, so far as the same are applicable." The qualification—"so far as the same are applicable"—must refer to the rules of the court and not to the law of the land. A case to which, by act of Congress, the law was not to be applied, or a material

* The Senate was informed that Granger had never testified at all before the Commission (*supra*, 13, *note*).

part of which had been decided by Congress itself, would not be justiciable.

The legal or judicial character of this question of due diligence is admitted by the court in its opinion on the merits (*Record*, 818), where, in addition to the remark already quoted, Mr. Justice Weldon said:

> "The decision of the court on the demurrer determined the sufficiency of the bill, and, as we have said, CONGRESS in the passage of the law, *determined* the LEGAL QUESTION as to whether there should be a re-examination of the claim and a retrial of the cause."

The court also held (*Record*, 814) that in the trial of this cause it was "in the exercise of equity powers." Now, the case must either be at law or equity to come within the judicial power of the United States or the jurisdiction of this court as defined in the Constitution. If it were at law, the award, being a judgment of an international court of final and exclusive jurisdiction, could be set up, with the solemn covenants of the treaty, in bar. If Mexico were the nominal as well as the real complainant, and if her suit were brought, as she proposed nearly twenty years ago to bring it, in the courts of the United States by a bill of review for the annulment of the award on the ground of newly-discovered evidence of fraud, the court would not have opened the award and allowed a rehearing—even if it decided it had jurisdiction—until the complainant had proved to its satisfaction two things, (1) that the new matter could not have been obtained by due diligence during the original trial; and (2) that it was not merely cumulative upon an issue tried or triable before, but proved *prima facie* such fraud—extrinsic and collateral to the original proceedings—as would entitle the complainant to equitable relief.* The defend-

*See the authorities on this point (*infra*, pp. 131–134).

ants are surely entitled now and here to the same protection as the law of the land would have afforded to them if they had been sued as proposed by the Mexican government. And it is incredible that Congress would undertake to confer "full jurisdiction" in equity upon the court and order it "in all respects to proceed in said cause *according to law*," while intending that a fundamental principle of equity jurisprudence should not be applied in the suit. Equity can not be emasculated by Congress in that way. A suit in equity must be conducted according to the established principles of equity, one of which is that equity will not relieve from laches or neglect in presenting matters of defense available by due diligence at the original trial.

It can be shown from the history of the act—if it is obscure or ambiguous—that it was not the intention of Congress to decide beforehand and withdraw from the jurisdiction of the Court of Claims and this Court the question whether the Mexican government could or could not have obtained the so-called newly-discovered evidence in time for the original trial. That is a judicial question, and an essential part of the case, which it can not be presumed that the legislative branch of the Government intended to decide. It was the intention of the Senate subcommittee of investigation to separate the evidence into two parts—one that was new in the legal sense, and one that had been or could have been submitted to the Joint Commission. On that point the learned chairman (Senator Morgan) said (*Record*, 749):

> "When we come to consider this case and report it to the general committee, as I suppose the general committee will also do when they come to consider and report it to the Senate, we will be compelled, *of course*, to separate between those portions of the evidence which are new and those which were before the arbitrators at the time this claim was considered,

> and *we will be compelled to ascertain how far Mexico was delinquent in not presenting this evidence in defense of the claim, and whether thereby she has not forfeited her right to have a reinvestigation.* But we can not anticipate, at this stage of the inquiry, how much of this evidence will be new and how much will be of a character that Mexico had and used, or *could have used if she had been sufficiently diligent in the pursuit of her rights.*"

But no such separation was made, or attempted, for the investigation was continued till the eve of adjournment, and an important part of the testimony was not printed until the day after the majority report was presented to the Senate. (Report 2705, Part 2, Views of Minority, Sen., 50th Cong., 2d Sess., p. 1.) The Committee printed the whole of the testimony taken in the investigation, although much of it consisted of a re-examination of witnesses whose testimony had been before the Commission, or who could have been examined by the Mexican government while the Commission was in session. Congress deliberately left the question of Mexico's diligence to the court, and required it " in *all* respects to proceed in the said cause *according to law.*"

Since the Act of December 28, 1892, was passed, the Government in this suit has proved by Sundell that he saw the letter-book, which is the most important part of the new evidence, in Granger's possession while the Commission was in session, and that he had translated Exall's letter of February 26, 1868, to Granger, on which such stress has been laid by Mexico, a few days after Exall left Tayoltita; *i. e.*, some time in March, 1868—*two years before the Company's claim was presented to the Commission.* (*Supra*, 109.)

The fact that an appeal is given to the Supreme Court shows that it was not intended by Congress to decide itself

or withdraw from judicial decision any judicial question properly arising in the suit, or to deprive the Company and the other defendants of any defense available in such a proceeding. The laws must be the same for all, and Congress can not deprive any person of any legal right by compelling him to become defendant in a suit in which he is precluded from making any proper defense.

As already observed, such a case would not be justiciable. So it was held, in substance, by the Court of Claims in *The Western Cherokee Indians* v. *The United States* (27 Ct. Claims, 1), in which it was said:

> "Congress can confer upon this court powers not strictly judicial, such as those of a *quasi* international tribunal, but *when its judgment may be reviewed in the Supreme Court*, its decision must be confined to *the legal rights of the parties.*"

When relief is sought in equity from a final decree, for fraud, upon new matter discovered since the decree was signed and enrolled, permission must first be obtained from the court, and that permission will not be granted unless it is shown to the satisfaction of the court that the new matter could not with due diligence have been produced at the original trial.

Mexico can not come into this forum in the name of the United States, and the Company can not be dragged in here, by virtue of an act of Congress which relieves the Government from a legal obligation and deprives the Company of a legal right proper and essential to the judicial nature of the proceedings.

This was admitted by the complainant below, for in the argument on the demurrer the Government's learned counsel said (29 Ct. Clms., 467):

> "It is for the *Court*, applying the charges of the bill (and the evidence appended as Exhibit B) to the claim as it stood before the Commission, to say

whether a *prima facie* case is or is not presented to proceed with the inquiry into the facts as directed by the act of 1892."

And one of the allegations of Mr. Attorney General's "Amended Bill in Equity"—an allegation which that learned officer would never have made if he had imagined that Congress had already decided the question and withdrawn it from the jurisdiction of the court—reads as follows (*Record*, 7):

> "That the said Republic of Mexico at various times exhibited and filed certain proofs in reply thereto, and *all the evidence* which said Republic of Mexico could by the use of the *utmost diligence* obtain within the time allowed by the rules adopted by the said Commissioners for obtaining proof against said claim."

The following denial of this allegation was made in the Company's answer (*Record*, 426, 427):

> "This defendant * * * denies the allegation * * * that the Mexican government filed all the evidence which, by the use of the utmost diligence, it could obtain within the time allowed by the rules adopted by the said Commissioners for obtaining proof in defense against the said claim; and this defendant alleges that the witnesses on whose *ex parte* affidavits and *exhibits** the Mexican government since the adjournment of the said Commission has sought to impeach the said award * * * could have been examined by the Mexican government, and their testimony rebutted by this defendant while the said claim was pending before the said Commission and before it was decided by the Umpire."

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*The letter-press copy-book and the original letters of Garth to Exall were obtained by the Mexican district attorney, Gaona, from Granger in December, 1877 (*Record*, 576, 577), and were attached as exhibits to De Lagnel's affidavit of December 2, 1878. (*Record*, 198–200.) They were offered in evidence in this suit in Tuttle's examination (*Record*, 471–473) and De Lagnel's (*ib.* 478, 479).

The answer says further on this point (*Record*, 431):

> "That the said Mexican government could have examined the said Gamboa and Loaiza after their depositions in support of this defendant's claim had been filed, as aforesaid, with the said Commission, in the year 1870, while the said claim of this defendant was pending before the said Commission during the years 1871, 1872, 1873, 1874, or 1875, but purposely refrained from so doing because aware that this defendant could and would have submitted proof to the said Commission showing the falsity of such later affidavits and the duress and fraud practiced by the Mexican government in obtaining them.*

It was held by Mr. Justice STORY in *Dexter* v. *Arnold*, 5 Mason, 303, that due diligence in such a case is proper to be put in issue. The learned Justice said:

> "If, indeed, it were doubtful, in case the bill of review should be allowed, whether the defendant could by plea or answer traverse the allegation in such bill, that the matter of fact is new, I should not hesitate to inquire in the most ample manner into the truth of such allegation before the bill was granted, in order to prevent gross injustice.
>
> "*But as every such bill of review must contain an allegation that the matter of fact is new*, it seems to me clear, upon principle, that, *as it is vital to the relief*, it is traversable by plea or answer, and must be proved, if not admitted at the hearing."

According to that opinion no bill of review will lie if the newly-discovered evidence could have been obtained by reasonable diligence before the original hearing.

The granting of a bill of review for newly-discovered

* The Company did this very thing in the case of Avalos, from whom, subsequent to his first deposition in support of the claim, the Mexican authorities, by threats and intimidation, obtained a false affidavit, the falsity and fraudulent character of which he exposed in a later affidavit, which was also filed with the Commission.

evidence is matter of discretion, and must be brought forward by petition to the court. Such a petition must describe the new evidence distinctly and specifically, and when discovered, and its bearing on the decree.

(See, also, *Barnett* v. *Smith*, 5 Call., 98; *Todd* v. *Barlow*, 2 Johns. Ch., 551; *Livingston* v. *Hubbs*, 3 Johns. Ch. R., 124; *Lansing* v. *Albany Ins. Co.*, 1 Hopk. Ch. R., 102; *Allen* v. *Ranney*, 1 Conn., 569; *Dulin* v. *Caldwell*, 29 Ga., 362; *Elliott* v. *Adams*, 8 Blackf., 103; *Cook* v. *McRoberts*, 5 Ky. Law Reports, 764; *Auble* v. *Ealer*, 2 Bin., 581, *note*; *Plymouth* v. *Russell Mills*, 89 Mass. (7 Allen), 438.)

On page 312 of the same opinion, Mr. Justice Story said:

> "A qualification of the rule quite as important and instructive is that the matter must not only be new but that it must be such as that the party, by the use of reasonable diligence, could not have known, for if there be laches or negligence in this respect, *that destroys the title to the relief*."

Referring to the authorities, the learned justice observed:

> "That doctrine was expounded and adhered to by Lord ELDON in *Young* v. *Keighley*, 16 Ves., 348, and was acted upon by Lord MANNERS in *Barrington* v. *O'Brien* (2 B. & Beatt., 140), and *Blake* v. *Foster* (2 B. & Beatt., 457, 461.)
>
> "It was fully recognized by Mr. Chancellor KENT and received the sanction of his high authority in *Wiser* v. *Blackley* (2 Johns. Ch. R., 488), and *Barrow* v. *Rhinelander* (3 *Id.*, 120.)
>
> "And in the very recent case of *Bingham* v. *Lawson* (3 Jac. & Walk., 243), Lord ELDON infused into it additional vigor."

Due diligence requires that every clue shall be followed, and if the defendant fails to question a witness on a matter which there is reason to believe is within

his knowledge, the defendant can not afterwards say that he did not know or had no means of knowing what such an examination would have disclosed. For how can one know what an inquiry would disclose if he does not make it?

In *Young* v. *Keighley* (16 Ves. Jr., 350), Lord Chancellor ELDON said:

> "The ground of this application upon the plaintiff's affidavit is that he and his solicitor, now deceased, did not know that Keighley's partners had an interest with him in the securities proposed and would be bound by his acts. It is extremely difficult to come to that conclusion *where the information before them led to those facts*, and the solicitor's want of information would not form a just ground for granting a bill of review, if, *by what was before him*, he was sufficiently apprised of them *to enable him to acquire complete knowledge*. The letter stating the securities to be *their* securities * * * at least put the plaintiff *upon inquiry*."

So in *Poullain* v. *Poullain*, 79 Ga., 11:

> "If a party *had an opportunity* to examine a witness at the trial, he can not, in general, obtain a new trial on the ground of newly-discovered evidence where the evidence relied upon is that of such witness."

It is observed in Story's *Equity Jurisprudence*, § 252*a* (12th ed., I.: 246), that—

> "the fraud, to justify a court of equity in setting aside the judgments of courts, either of law or equity, domestic or foreign, must be that which occurs in the very concoction or procuring of the judgment itself, and something not known to the opposite party at the time, and *for not knowing which he is not chargeable with neglect or inattention*."

So ADAMS on *Equity* (Phillips' edition, 1881, pp. 196, 197):

> "And still less can any equity arise *if the facts were known at the time of the trial*, and the grievance complained of has been caused either by a mistake in the pleading or *other mismanagement*, or by a supposed error in the judgment of the court." (Citing *Bateman* v. *Willis*, 1 Sch. & L., 201; *Harrison* v. *Nettleship*, 2 M. & K., 428; *Taylor* v. *Sheppard*, 1 Y. & C., 271.)

The American authorities are collected in a note by Mr. Phillips (*ib.*, pp. 197, 198) in support of the proposition that "no injunction will be granted against a judgment *where there has been negligence on the part of the complainant in availing himself of a defense at law or other neglect.*"

This doctrine is part of the definition of a bill of review:

> "A bill of review is a bill filed to reverse or modify a decree that has been signed and enrolled for error in law apparent on the face of such decree, or on account of new facts discovered since publication was passed in the original cause, and which *could not by the exercise of due diligence have been discovered or used before the decree was made.*" (FOSTER'S Fed. Pr., § 354, citing MITFORD'S Pl., ch. I, § 3, pt. 3; STORY'S Eq. Pl., §§ 403–420; *Irvin* v. *Meyrose*, 7 Fed. Rep., 533; *Nickle* v. *Stuart*, 111 U. S., 776.)

So this court in *Kennedy* v. *Georgia State Bank*, 8 How., 586, said:

> "Since the ordinances of Lord BACON a bill of review can only be brought for 'error in law appearing in the body of the decree or record' without further examination of matters of fact, or some new matter of fact discovered which was *not known and could not possibly have been used at the time of the decree.*"

In *Life Ins. Co.* v. *Bangs*, 103 U. S., 782, Mr. Justice Field, for the court, said:

> "A suit in equity will not lie to give effect to defenses against a claim when they might have been fully set up in an action at law. There must have been some fraud practised upon the court or some unconscientious advantage taken of the defendant *without any fault or negligence on his part*; or there must be some newly-discovered evidence *which could not have been obtained at the trial*, and which if produced would have changed the result, before a court of equity will interfere with the judgment rendered, or with the contract upon which it was recovered. (Citing *Home Ins. Co.* v. *Stanchfield*, 1 Dill. 424; *Marine Ins. Co.* v. *Hodgson*, 7 Cr., 332; *Phœnix Ins. Co.* v. *Bailey*, 13 Wall. 616.)

In *Wood* v. *Carpenter*, 101 U. S., 135, Mr. Justice Swayne said, for the court, near the close of his opinion:

> "There must be reasonable diligence; and the *means* of knowledge are the same thing, in effect, as knowledge itself."

And Lord Camden in *Smith* v. *Clay*, 3 Bro. Ch. 639, said that—

> "Nothing can call forth this court [a court of equity] into activity, but conscience, good faith, and *reasonable diligence;* when these are wanting, the Court is passive and does nothing."

In *United States* v. *Bullock*, the United States District Judge said:

> "It is extremely doubtful whether the petitioners bring themselves within the rules prescribed by courts of equity for granting a bill of review, *for the receipt that now seems to have been found was always in the department*—it was about eight years before it was looked for, and then certified to be lost or burned; whether reasonable diligence has been made use of to search for it is yet very questionable. It is ordered

that the petition be dismissed." (Note to *United States* v. *Nourse*, 6 Pet., at p. 485.)

This rule was, by a court of the United States, held applicable to the Government of the United States when it was the real party plaintiff seeking to recover public money due from one of its officers.

When the Government enters into commercial transactions or becomes a litigant, it abdicates its sovereignty, and is subject, like a private citizen, to the law of the land.

In *Cooke et al.* v. *The United States*, 91 U.S., 389, Mr. Chief Justice Waite, delivering the opinion of the court, said:

> "Laches is not imputable to the Government, in its character of sovereign, by those subject to its dominion. *United States* v. *Kilpatrick*, 9 Wheat., 735; *Gibbons* v. *United States*, 8 Wall, 269. Still a government may suffer loss through the negligence of its officers. If it *comes down from its position of sovereignty* and enters the domain of commerce, it submits itself to *the same laws that govern individuals there.* Thus, if it becomes the holder of a bill of exchange, it must use the same diligence to charge the drawers and indorsers that is required of individuals; and, if it fails in this, its claim upon the parties is lost. *United States* v. *Barker*, 12 Wheat., 559. Generally, in respect to all the commercial business of the Government, if an officer specially charged with the performance of any duty, and authorized to represent the Government in that behalf, neglects that duty and loss ensues, the Government must bear the consequences of his neglect."

In *United States* v. *Barker* (*supra*), the court said, per Mr. Chief Justice Marshall:

> "There was no doubt that the United States had no right to recover on account of the neglect in giving due notice after the return of the bills."

In *United States* v. *Bank of Metropolis*, 15 Pet., 377, it was held:

> "Where the United States, by its authorized agent, become a party to negotiable paper, they have all the rights and incur all the responsibilities of individuals who are parties to such instruments. There is no difference *except that the United States can not be sued. But if the United States sue* and the defendant holds its negotiable paper, the amount of it may be claimed as a credit, if, after being presented it has been disallowed by the accounting officers of the Treasury, and if the liability of the United States on it be not discharged *by some of those causes which discharge a party to commercial paper*, it should be allowed by a jury as a credit against a debt claimed by the United States."

In *United States* v. *Hancock*, 30 Fed. Rep., 851, it was said:

> "Such a suit is part of the compulsory litigation forced upon claimants by that act; and as the Government consented to appear therein as an equal litigant, and *impliedly waived all rights peculiar to it as a sovereign*, the maxim *nullus tempus occurrit regi* does not apply.
>
> * * * * * *
>
> "It would be indecent to suppose that Congress, when thus summoning all claimants of land in the ceded territory before tribunals of its own creation did not intend that the United States should appear before them as a litigant seeking and willing to render justice, contending *on equal terms with their adversaries, claiming no rights not conceded to them and no special privileges as a sovereign.*" (P. 860.)

Though under our Constitution a State may appear as a suitor in the first instance in this court, yet this is the only privilege it can claim over the individual litigant. So it was held in *State of Pennsylvania* v. *The Wheeling*,

&c., Bridge Co., 13 How., 518, in which Mr. Justice McLean said, for the court (pp. 559, 560):

> "In this case the State of Pennsylvania is not a party in virtue of its sovereignty. * * * The rights asserted and the relief prayed are considered as *in no respect different from those of an individual.* From the dignity of the State, the Constitution gives to it the right to bring an orignal suit in this court. And this is the *only* privilege, if the right be established, which the State of Pennsylvania can claim in the present case."

The convention of July 4, 1868, simply created a forum in which the claims of individual citizens of Mexico against the United States and individual citizens of the United States against Mexico were to be examined and determined, and the Law of Nations, under which this reciprocal international adjudication was effected, required that the parties should use due diligence in the prosecution and defence of the claims. International arbitration is one of the *legal* means of redressing individual wrongs and vindicating individual rights, as shown by Phillimore in his work on International Law (vol. III, pp. 2, 3), where he refers to the analogy between National or Municipal Law and the Law of Nations, and says, referring to war as "the terrible *litigation of States*":

> "II. But as we approach these awful confines, we must remember that it is the bounden and most sacred duty of every State to exhaust every LEGAL *means of redress* before it has recourse to the dreadful necessity of war. These means are * * * classed under two heads, viz.:—
>
> 1. Measures taken *via amicabili.*
>
> 2. Measures taken *via facta*, which, nevertheless, fall short of war.
>
> III. Measures taken via amicabili are: 1. Negotiation; 2. *Arbitration.*"

This legal international procedure for the redress of individual wrongs requires due diligence in its conduct not less than municipal law, and provides as stringently against any default by requiring the parties to acquiesce in the sentence if it is within the terms of the submission and the arbitrators have been incorrupt and impartial. (*Supra*, 61, 62; 83–87.)

VII.

The Court of Claims erred in not dismissing the bill on the ground that its allegations relate solely to issues passed upon by the Mixed Commission when it examined the claim of La Abra Company, and that the so-called newly-discovered evidence is merely cumulative upon issues already tried, and does not show, or tend to show, the kind of fraud for which equity will grant relief.

The learned counsel for the Government made the following admission in open court and in his brief on the demurrer:

> "Defendants, through one of their counsel, Mr. Kennedy, have filed an argument of 90 pages in support of their sixth and tenth causes of demurrer. Their sixth cause is that the allegations of the bill (including certain newly-discovered proofs appended thereto as Exhibit B, and by paragraph XVI of the bill made part thereof) *relate solely to issues passed upon by the Mixed Commission when it examined the claims of La Abra Company.*
>
> "*This is true*, and there is no need to say anything more on that point in behalf of complainant. If this be ground for demurrer the bill must be dismissed, and the whole purpose of the act must fail (if the power it confers be judicial)." (*The United States* v. *La Abra Co.*, 29 Ct. Clms., 484.)

(*a*) As stated in the History of the Case (*supra* 7), the same question of fraud submitted to the Court of Claims by the jurisdictional act of 1892, was tried by the Mixed Commission under the convention of 1868.

General Adams was charged with improper conduct in obtaining the evidence for the Company in Mexico by witnesses who were examined on behalf of the Mexican Government in the Mexican courts, and copies of whose depositions were filed with the Commission. (*Record*, 111, 113.) These charges, with that evidence, were pressed upon the attention of the Commissioners by the Mexican agent, Mr. Avila (*Record*, 413, 420), and emphasized by the Mexican Commissioner, Mr. Zamacona, in his opinion. (*Record*, 405, 406.) Testimony in rebuttal was submitted by the Company (*Record*, 162–164, 178, 179, 190, 191), and the controversy on this point, with all the evidence, arguments, and opinions, went to the Umpire,* who, after due deliberation, rendered his award in favor of the Company. The same charges of fraud and perjury were again brought to his attention in the motion for a rehearing, in regard to which he said, in his decision denying the motion:

> "In the above-mentioned case, No. 489, the Mexican agent would wish the Umpire to believe that all witnesses for the claimant had perjured themselves, whilst all those for the defense are to be implicitly believed. Unless there had been proof of perjury, the Umpire would not have been justified in refusing credence to the witness on the one side or the other, and could only weigh the evidence on each side, and decide to the best of his judgment in whose favor it inclined. If perjury can still be

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* It was provided in the treaty (Art. II) that "such Umpire, after having examined the evidence adduced for and against the claim, and after having heard, if required, one person on each side as aforesaid, and *consulted with the Commissioners*, shall decide thereupon finally and without appeal."

proved by further evidence, the Umpire apprehends that *there are courts of justice in both countries by which perjurers can be tried and convicted, and he doubts whether the Government of either would insist upon the payment of claims shown to be founded upon perjury.*" (Ex. Doc. No 103, H. R., 48th Cong., 1st Sess., 128.)

Thus it appears that the evidence obtained by General Adams in Mexico was subjected to the scrutiny of the Commission, and was found sufficient, with testimony from other sources, to justify the award; and, furthermore, that Mexico was put upon notice to lay a judicial foundation, if she could, for her objections to the award by bringing the alleged perjurers, who were within her jurisdiction, to trial and conviction for their crime. Instead of doing this, she made the contracts with Slaughter and Granger, which are set out in the History of the Case (*supra*, 9–13), under which, for a compensation, contingent upon their success, *they* were "to undertake the proof of fraud," and she carefully refrained from putting on trial for perjury Chavarria, Galan, Avalos, Green, Clark, Cole, or Cryder, some of them citizens, and all of them residents, of Mexico, and within reach of her process.

(*b*) Not only was the same question of fraud examined and determined by the Mixed Commission but so also was the question (on a mass of conflicting evidence), whether the Company was compelled to abandon its business and property in Mexico by the unlawful acts of the local magistrates, or whether the cause of the abandonment was that the ores would not pay to work, and that the Company's funds were exhausted. The Government's counsel admitted that this issue had been tried, and the Court of Claims declares that it has, in effect, retried it collaterally. (*Supra*, 88.) Indeed, it is upon its retrial and decision of *this* issue—which was tried and

determined under the convention—that the court bases its conclusion that the award was obtained by fraud; for, as shown elsewhere, the court does not find that any material part of the evidence was false, or that any particular witness was perjured. No actual fraud, that could be defined, under the old practice, in the decree—showing what it was, who did it, and how it was done—is found by the court, but it reaches its conclusion constructively, or by a process of reasoning which it expresses as follows (*Record*, 842):

> "The court upon an examination of all the testimony, excluding such portions of it as in the opinion of the court are not competent, determines as a conclusion of fact that the La Abra Silver Mining Company did not abandon its mines in Mexico because of the interference of the people of Mexico and the public authorities of the Mexican government, or either, but on the contrary that it abandoned its mines because they were unproductive and for want of money to operate and work the same, *and* that the award made by the United States and Mexican Mixed Commission in respect to the claim of the said La Abra Silver Mining Company was obtained as to the whole sum included therein by fraud effectuated by means of false swearing and other fraudulent practices upon the part of the said Company and its agents."*

Mexico—as the Court of Claims has said—is the real party plaintiff in this proceeding, and it is thoroughly settled that an issue which has been tried can not be retried between the same parties in equity. The rule is

* This conclusion was reached by the court because it differed from the United States Commissioner and the Umpire as to the moving cause of the Company's abandonment of its business and property; but, as argued elsewhere, the ores might have been poor and the Company short of funds, and yet the real reason of the abandonment have been the persistent illegal interference and hostility of the officials and a justifiable fear on Exall's part for his life or liberty.

thus stated in *United States* v. *Throckmorton* (98 U., S., 61, head note by Mr. Justice Miller):

> "The frauds for which a bill in chancery will be sustained to set aside a judgment or decree between the same parties, rendered by a court of competent jurisdiction, are frauds extrinsic or collateral to the matter tried by the first court, and not a fraud *which was in issue in that suit.*"

In the body of the opinion Mr. Justice Miller said:

> "In all these cases, and many others that have been examined, relief has been granted on the ground that by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court.
>
> "On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it is founded on a fraudulent instrument or perjured evidence, or for any matter *which was actually presented and considered in the judgment assailed.*"

Freeman on Judgments, vol. 2, sec. 489, pp. 858–862, says:

> "The procuring of a judgment by perjury or subornation of perjury, is doubtless a fraud, and such a fraud as would induce equity to grant relief, were it not for the fact that its existence can rarely or never be ascertained otherwise than by *trying anew an issue already tried in a former action.*
>
> "Whenever *an issue exists* in any action or proceeding, each of the parties should anticipate that his adversary will offer evidence to support his side of it, and should be prepared to meet such evidence with counter proof. When he has an opportunity to do this, and does not avail himself of it, or, though availing himself of it, is unable to overcome the effect upon the court or jury of the evidence offered by his adversary, *he can not, in effect, obtain a retrial of the issue before another tribunal by charging that the judgment against him was procured by perjury.*"

In *Ross* v. *Wood*, 70 N. Y., 8, the Court of Appeals held (all concurring):

> "Relief can only be granted upon some *new matter of equity not arising in the former case.* Equity will not take cognizance on the same grounds of the very point which another court of competent authority in the case has considered and decided. Per Chancellor Kent, *Simpson* v. *Hart*, 1 Johns. Ch., 91. Lord Redesdale, in *Bateman* v. *Willoe*, 1 Sch. & Lef., 201, says: 'I do not know that equity ever does interfere to grant a trial *of a matter which has already been discussed in a court of law, a matter capable of being discussed therein*, and over which the court of law had full jurisdiction.' This is the settled doctrine of courts of equity. *Williams* v. *Lee*, 3 Atk., 225; *Le Guen* v. *Gouverneur*, 1 Johns. Cas., 436; 1 Am. Dec., 121. And the rule should not be relaxed to retry questions deliberately tried and adjudicated by courts of equity having concurrent jurisdiction of the subject-matter with that in which the action to be relieved from the judgment or decree is brought."

In *Cotzhausen* v. *Kerting*, 29 Fed. Rep., 823, Dyer J., said:

> "It is not a sufficient ground of relief in equity against a judgment at law that one of the parties, or that some witness, or many witnesses, testified falsely upon *a material question of fact in issue.* If upon such grounds a court of chancery were to reopen issues settled by verdict of a jury, and thus relieve suitors from judgments recovered at law, it is difficult to see where litigation would stop, and what stability there would be in the adjudications of courts of law."

In *Moffat* v. *U. S.*, 112 U. S., 24, Mr. Justice Field, delivering the unanimous opinion of the court, said:

> "A strenuous effort is made by counsel to bring these cases within the doctrine declared in *U. S.* v. *Throckmorton*, 98 U. S., 61, and *Vance* v. *Burbank*, 101 U. S., 514, but without success. It was held in

those cases that the fraud which will justify the setting aside of the judgment of *a tribunal specially appointed to determine particular facts*, must be such as prevented the unsuccessful party from fully presenting his case, or which operated as an imposition upon the jurisdiction of the tribunal. Mere false testimony, or forged documents are not enough *if the disputed matter has been actually presented to and considered by the tribunal.*"

In *U. S.* v. *Flint*, 4 Sawyer, 52, in which the grounds of equitable relief from final judgments and decrees were exhaustively discussed, Mr. Justice Field observed:

"It is to no purpose in such case to invoke the doctrine that fraud vitiates all transactions, even in the most solemn, and that a court of equity will set aside or enjoin the enforcement of the most formal judgments when obtained by fraud. The doctrine of equity in this respect is not questioned; it is a doctrine of the highest value in the administration of justice, and its assertion in proper cases is essential to any remedial system adequate to the necessities of society. But it can not be invoked to *reopen a case in which the same matter has been once tried, or so put in issue between the parties that it might have been tried.* The judgment rendered in such a case is itself the highest evidence that the alleged fraud did not exist, and estops the parties from asserting the contrary. It is afterwards mere assumption to say that the fraud was perpetrated. The judgment has settled the matter otherwise; it is *res judicata.*"

Later on, and drawing the distinction between fraud extrinsic or collateral to the original action, and fraud intrinsic or at issue therein, the learned Justice said:

"The credibility of testimony, given in a case, bearing upon the issue, *is not an extrinsic collateral act*, but is a matter involved *in the consideration of*

the merits; and the introduction of false testimony, known or shown to be so, does not affect the validity of the judgment rendered."

These authorities are also conclusive on another objection to "the newly-discovered evidence," namely, that it is merely cumulative, upon issues already tried, and does not show, or tend to show, the particular kind of fraud, extrinsic or collateral, to the original trial, for which equity will afford relief. This kind of fraud, *e. g.*, preventing the presentation of the other party's evidence by unlawfully withholding it, as charged by Galan against the Mexican district attorney, Gaona (*Record*, 188), and by the Rosario and Carmen Mining Company, in its petition to Congress,* is not charged against the Company, in this proceeding, or hinted at in "the newly-discovered evidence." It is introduced to show two things—both of which were in issue and tried in the original trial—(1) that the material testimony was obtained by fraud, and (2) that the Company abandoned its business and property at Tayoltita because its mines were worthless and its means exhausted. As already stated, it was shown in the argument on the demurrer, and admitted by the Government's learned counsel, that these issues were tried and determined by the Mixed Commission under the Convention. (*Supra*, 127.)

The admission is as broad as it possibly could be—"*that the allegations of the bill* (*including certain newly-discovered proofs appended thereto as Exhibit B*, and by paragraph XVI of the bill made part thereof)—*relate*

* "The petitioners allege that the Mexican authorities viciously and dishonestly *purloined and suppressed the material evidence so taken and submitted by them in aid of their said claim*, by means of which fraudulent suppression of evidence by Mexican authorities and the introduction by them of evidence of perjured witnesses the same was decided adversely to them." (Rep. No. 700, H. R., 45th Cong., 2d Sess., 1.)

SOLELY *to issues passed upon by the Mixed Commission when it examined the claims of La Abra Company.*"

The chief importance of certain of Exall's letters, as they appear in the letter-press copy book, is that they support the testimony of Mexican witnesses to the effect that the ores mined by the Company did not pay for working. There was a mass of such testimony before the Umpire, and, even if he had allowed the Company the value which it put upon its mines (instead of taking the actual expenditures as the measure of damages), this issue could not be retried upon such evidence, because (1) it is cumulative, and (2), as already shown, and found as a fact by the Court of Claims, it could have been obtained by due diligence for use in the trial of the claim before the Commission. Nor could it be used in a retrial to impeach Exall as a witness, even if the award had been based on his uncorroborated testimony, instead of being, as it unquestionably is, supported by a mass of evidence that has been in nowise impeached.

The second of these points has already been discussed and authorities cited, but the case of *Livingston* v. *Hubbs*, 3 Johns. Ch., 124, bearing, as it does, on them both, is here cited again :

> "The defendant's attention (said Mr. Chancellor Kent), was called to the very fact, and he was bound to use reasonable diligence in bringing forward his proof on that point. The necessity of reasonably active diligence, in the first instance, is imposed upon parties, and a bill of review is not to be sustained *merely to accumulate testimony. This is the clear and necessary doctrine of the court.*"

Then, citing Lord Bacon's Ordinances, the learned Chancellor says (p. 126):

> "A bill of review upon matter of fact, must be

upon special leave of the court and upon oath of the discovery of new matter, or evidence which hath come to light after the decree, *and could not possibly be had or used at the time when the decree passed.* If the party might have used the new proof when the decree was made, it is not a sufficient ground for a bill of review."

* * * * * *

(Page 127): "Most of the testimony goes to the credit of the witnesses examined on the part of the plaintiff, but *the credit of witnesses is not to be impeached after the hearing and decree.* Such applications for an examination to the credit of a witness are always regarded with great jealousy, and they are to be made before the hearing (*White* v. *Fussell*, 1 Ves. & B., 151). *There would be no end of suits if the indulgence asked for in this case was to be permitted.* The nature of the newly-discovered evidence must be different from that of *the mere accumulation of witnesses to a litigated fact.*"

Counsel does not forget that the Court of Claims has held that the rules of chancery are not applicable to this suit, but if the court is right in thus interpreting the jurisdictional act, then this proceeding, in which the same court said it sat "in the exercise of equity powers," is not a suit, but a mere investigation, from which no appeal can be taken to the Supreme Court of the United States.

In *Southard et al.* v. *Russell*, 16 How., 547, Mr. Justice Nelson, delivering the opinion of this court, cites "the rule as laid down by Chancellor Kent" (*supra*), and observes (pp. 569, 570):

"The soundness of this rule is too apparent to require argument, for, if otherwise, *there would scarcely be an end to litigation in chancery cases, and a temptation would be held out to tamper with witnesses*

for the purpose of supplying defects of proof in the original cause." *

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* The danger indicated by Mr. Justice Nelson is illustrated by Mexico's contracts with Slaughter and Granger (*supra*, 9, 10, 15, 16), and by Slaughter's so-called petition to Congress, in which "the newly-discovered evidence" was garbled and falsified.

Another illustration is furnished by Mexico's attempts, in 1877 and 1878, to obtain documentary evidence from Exall, in New York, upon promise of a large amount of money and immunity from prosecution.

The Mexican Minister (Mr. Zamacona), General Slaughter, and Mr. Lines, with the assistance of two detectives (Fisher and Weed), made persistent efforts in New York to purchase from Exall books and papers of the Company, which they supposed were in his possession, but which he had left at Tayoltita, and which the Mexican district attorney, Gaona, was obtaining from Granger, under the agreement between them, at the same time—late in 1877 and early in 1878—at Mazatlan.

Mr. Kittelle, who had been requested by Exall to find out for him, as a friend, what the detectives wanted, and who were behind them, was examined in the Senate investigation, and what follows is from his testimony. (Rep. 2705, Sen., 50th Cong., 2d Sess., 773):

> "I asked him (Weed) definitely for the names of the parties that stood behind him in this matter, and *what assurance Mr. Exall had that the money would be forthcoming if he consented to their proposition.*
>
> "Q. Well, go on and state what Mr. Weed said to you on that subject.—A. At that time Mr. Weed * * * named Mr. Lines, General Slaughter, and Mr. Zamacona as the parties, and said *the money would be furnished by Mr. Zamacona*, but he believed that the Mexican government stood behind him, or stood behind them all.
>
> "Q. Was anything said at that interview in regard to immunity for Exall?—A. Oh, certainly, that was a part of the—— he (Weed) confirmed what he (Fisher) said; he said the same in substance as Fisher said to me. He said *the parties were strong, and would protect Mr. Exall from the consequences that might result from the change of his testimony, or for his furnishing them with the desired testimony.*"

Fisher, one of the detectives, was also examined, and he said, in answer to a question as to what he told Exall (*ib.*, 889):

> "*I was liable to tell him a good many things for the purpose of getting evidence out of him* * * * I have not any doubt that I told him it could be arranged satisfactorily, *so that no harm would come to him.*"

Of a kind with these sinister and forbidden methods were the false charges made against the late General Adams, on the authority of the Mexican government, while the convention for a rehearing was pending in regard to his record in the Mexican war and the war of the rebellion, for which (and their tardy withdrawal by Mexico's counsel) see Appendix V, *infra*.

VIII.

The Company had in the award a vested right of property of which the bill seeks to deprive it without just compensation or without due process of law.

It is admitted that the Company was a corporation—a citizen of the United States—and that it owned mines, reductions works, and other property in Mexico. Any losses it may have there sustained by reason of the acts or defaults of Mexican officials gave it a right to recover damages from Mexico, and this right is property. Mr. Chief Justice Kent in *Gracie* v. *New York Insurance Co.*, 8 Johns. R., 237, remarked:

> "If France should at any future period agree to and actually make compensation for the capture and condemnation in question, the Government of the United States, to whom the compensation would in the *first instance* be payable, would become *trustee* for the party having the equitable title to the reimbursement."

Justice Story in *Comegys* v. *Vasse*, 1 Pet., 193, speaking for this court, said (p. 215):

> "The *right to indemnity* for an unjust capture, whether against the captors or the sovereign, whether remediable in his own courts or by his own extraordinary interposition and grants upon private petition, or upon public negotiation, *is a right attached to the ownership of the property itself*, and passes by cession to the use of the ultimate sufferer."

Referring (p. 217) to *Randall* v. *Cochran*, 1 Ves., 98, Mr. Justice Story said that the case—

> "stands upon the true ground. It considers the right of indemnity as travelling with the right of *property*."

Alluding to the provisions for indemnity which had been made by treaty with Spain in the case under consideration, he declared that the treaty—

> "recognized *an existing right to compensation* in the aggrieved parties, *and did not, in the most remote degree, turn upon the notion of a donation or gratuity.* It was demanded by our Government *as matter of right, and, as such, it was granted by Spain.*"

This opinion of Mr. Justice Story was considered by this court in *Phelps* v. *McDonald*, 99 U. S., 298, as "exhaustive and conclusive." The court, in the last-named case, said, speaking of the claim of a citizen against a foreign government:

> "There is no element of a donation in the payment ultimately made in such cases. Nations, no more than individuals, make gifts of money to foreign strangers. Nor is it material that the claim can not be enforced by a suit under municipal law which authorizes such a proceeding. * * * If the demand be just, and recognized as valid by the law of nations, the claimant or his government, if the latter choose to do so, may still press it upon the attention of the alien government.
>
> "If the thing be assigned, the right to collect the proceeds adheres to it and travels with it whithersoever the *property* may go. They are inseparable. Vested rights *ad rem* and *in re*—possibilities coupled with an interest and claims growing out of property—pass to the assignee. The right to indemnity for the unjust capture or destruction of property, whether the wrongdoer be a government or an individual, is clearly within this category."

In *Emerson* v. *Hall*, 13 Pet., 409–413, the court again cites with approval *Comegys* v. *Vasse* (*supra*), and speaking of a claim against a foreign government for spoliations, declares:

> "The demand is, in such case, founded upon the

law of nations, and the obligation is perfect upon the offending government. It is true, remuneration can not be recovered against the government by action at law, but, if justice be not done, the government of the injured citizen, in the exercise of its discretion, will protect and enforce *his* rights." (Cited on another point, *supra*, 60, 61.)

See, also, *Milnor* v. *Metz*, 16 Pet., 221; *Mayer* v. *White*, 24 How., 317; *Bachman* v. *Lawson*, 109 U. S., 659.

It was admitted by the Government's counsel in the court below—

> "That a claim of an American citizen against a foreign government is private property, passing by assignment, voluntary or involuntary, and forming assets in his estate; that a judgment on such claim in his favor, rendered by a court of competent jurisdiction, in a suit between him and such foreign government, is also property; and that such a judgment can only be set aside or vacated by judicial proceedings between the same parties, and not by legislative action." (29 Ct. Clms., 459, 460.)

Having this property right, it can not be pretended that the Company lost it because of the fact that the Government presented the claim and the evidence upon which it rested to the Joint Commission, or because of the manner in which Mexico made payment thereof. The injured citizen "must," to use the language of this court in *United States* v. *Diekelman* (92 U. S., 520), "seek redress through his own government. His government must assume the responsibility of presenting his claim, or it need not be considered." So Vattel and Phillimore (cited *supra*, 62).

The only way in which the Government's counsel could escape the effect of his admission was by suggesting that there had been an *appropriation* of the Company's claim

by the United States, and a release of Mexico, which "release and appropriation," he said, "was effected by Article V of the Treaty of 1868, with respect of all claims on Mexico arising prior to its ratification—the appropriation taking effect November 20, 1876." (29 Ct. Clms., 460.)

But at this date the Company's claim had been merged in the Umpire's award, which was rendered on the 27th of December, 1875, and the Vth Article of the Treaty, instead of being "a release and appropriation," was a covenant between the high contracting parties "to consider the result of the *proceedings of this Commission* as a full, perfect, and final settlement of every claim upon either Government arising out of any transaction prior to the exchange of the ratifications of the present Convention." That is, the awards were to take the place of the claims, and the two Governments (Art. II) were "to consider the decisions of the Commissioners conjointly or of the Umpire, as the case may be, absolutely final, and conclusive upon *each* claim decided upon by them or him, respectively, and *to give full effect to such decisions*, without any objection, evasion or delay whatsoever."

There was no release or appropriation on either side, but each Government paid in cash to the other the sums awarded in favor of their respective citizens. Mexico deducted the sum total of the awards in favor of her citizens from the sum total she owed to the United States for the awards in favor of our citizens, but this amount was restored by Congress to the Secretary of State, so as to put into his hands for distribution the exact amount that was awarded to our citizens.

In earlier times it was usual, as may be seen by reference to the case of *Randall* v. *Cochran* (*supra*), for the sovereign to grant letters of reprisal against the offending

nation to his individual subjects who had unjustly sustained losses at its hands. Provided with these letters, these citizens obtained reparation for themselves or for others who had suffered. When not themselves the only sufferers, it was usual for the King to appoint commissioners to distribute the proceeds of these reprisals among the sufferers. Lord Hardwicke found, in the case just cited, that these commissioners would not permit the underwriters, but only the *owners*, to make claim for the losses, although the owners were already satisfied for their loss by the underwriters, and he decreed that the former should account for the same to the latter. (*Comegys* v. *Vasse*, 1 Pet., at p. 214.)

In the present advanced state of the law, and owing to the growth of civilization, it is the practice of governments to seek, in all cases, by diplomatic negotiation or arbitration, the settlement of such claims. A citizen, spoliated by a foreign government, though entitled to obtain redress from such government, must obtain it through means of his own government. (Wharton's Dig. Inter. Law, sec. 214; and authorities cited *supra*, 60–62). His government, having taken charge of the case for the purpose of pressing it diplomatically, continues to control and conduct it when it is referred to arbitration. The contention that was made by counsel below that this award is to be considered public money, because, under article 2 of the treaty, all claims, and the evidence in support of them, were required to be presented to the Joint Commission by the respective governments, is, in view of the authorities and the practice of governments, simply astonishing. It was stoutly maintained by our Commissioners, Messrs. Marcy and Brackenridge, under our treaty of 1839 with Mexico—substantially similar in its provisions to the one under consideration—that American citizens were designated therein

*as parties in interest on the one hand and the Mexican Republic on the other.**

* ART. I of this treaty provided: It is agreed that all claims of citizens of the United States upon the Mexican government, statements of which, soliciting the interposition of the Government of the United States, have been presented * * * until the signature of this Convention shall be referred to four Commissioners * * * to examine and decide * * * according to such evidence as shall be laid before them on the part of the United States and the Mexican Republic, respectively.

The IVth article provides for the delivery of all documents in relation to these claims in the possession of our State Department and of all those in the custody of Mexico to this board for the adjustment of these claims.

The Mexican Commissioners contended that the board could "receive no documents unless from the departments of the respective governments, and in the form and manner in which they may be transmitted from the same."

Our Commissioners (Messrs. Marcy and Brackenridge) declared that they differed *toto cælo* from their associates on this subject, and insisted that "the right of an individual to be heard, either by parol or in writing," was an "inherent right of man;" that in the cases before the board *each claimant* was "the *actor* or plaintiff, the State of Mexico the *reus* or defendant, and the Board of Commissioners the *judex* or judge," and that it was "the right of both parties to be heard, each by his agent or counsel (if he shall so choose), in writing or *viva voce*, as he may select."

As the Mexican Commissioners resented the expression "*reus*" as applied to the Mexican Republic, the American Commissioners explained that they had used it merely as indicating a party defendant; "that in every contested case there must be two parties, and that the *Convention designated American citizens as parties in interest on the one hand and the Mexican Republic on the other.*" (Moore, International Arbitration, 1227, 1228.)

This is cited to show that though the two governments are parties to Conventions for the settlement of individual claims, and though the proceedings thereunder are conducted through governmental agencies, the individual claimants have been recognized as the real parties in interest.

Under the terms of that Convention, of which the Mexican Commissioners demanded a strict construction, it became necessary to agree upon an indirect communication with the claimants, when further evidence was needed, in order that they might file it in the Department of State, from which the Commission would subsequently obtain it.

At the outset of the proceedings under the Convention of 1868 Mr. Fish, the Secretary of State, said while the responsibility of deciding questions of fact and law rested with the Commissioners, "it has been and is the purpose of this Department to interpose no obstacle to the submission of any claim *with such proofs* and *arguments* in its support *as the claimant* may furnish." (*Record*, 743.)

Under Art. II of the Convention of 1868, which provided that the Commissioners and also the Umpire were "to hear, if required,

The Company's claim in this case has simply been merged in the award, and this award is a *judgment* of a court of competent and exclusive jurisdiction. Speaking of the award of the Emperor of Russia, Mr. Attorney General Wirt firmly contended that it was "the solemn and *authoritative decision of a regularly constituted tribunal* on the rights of the parties litigant before it." (6 American State Papers, Foreign Relations, 950, 951.)

Mr. Secretary Fish described the Venezuelan Mixed Commission as "the High Court." (Mr. Fish to Mr. Partridge, Aug. 14, 1869, Ex. Doc. 176, H. R., 41st Cong., 2d Sess., p. 15; see, also, p. 35, where he speaks of "the judicial character" of that Commission.) Mr. Seward described the same Commission (*supra*, 87) as "a court of the highest order known to public law."

Mr. Lawrence says, in *note* 51, on page 133 of his edition of Wheaton's International Law, that—

> "The difference between a mediator and an arbitrator consists in this: that the arbitrator pronounces a *real judgment* which is *obligatory*, and that the mediator can only give his counsel and advice."

The decision of this court that the award of the Commission under the treaty of 1819 with Spain is not reexaminable, and that "the parties must abide by it as the *decree of a competent tribunal of exclusive jurisdiction*," has already been cited (*supra*, 88).

In La Abra case there was a long contest, a real trial*—

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one person on each side on behalf of each government on each and every separate claim," they heard counsel for the respective claimants, and this has been the custom under similar provisions in later arbitrations.

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*This was admitted by the Mexican Minister at Washington, who said: "There was no laches on the part of Mexico at the trial of either of the claims. In the Abra case *she made a vigorous defense*, and a careful examination of the evidence will convince a lawyer (which the Umpire unfortunately was not) that he erred in giving the preponderance of evidence to the claimant." (*Mr. Romero to Mr. Frelinghuysen*, January 25, 1884, Ex. Doc. No. 103, H. R., 48th Cong., 1st Sess., 780.)

actor, *reus*, and *judex*—and, as we have seen, the treaty provided in the most stringent and solemn terms for the finality and conclusiveness of the decision in each case, whether made by the Commissioners jointly, or, on their disagreement, by the Umpire.

The admission of the Government's counsel (*supra*)—

> "that a claim of an American citizen against a foreign government is private property * * *; that a judgment on such claim in his favor, rendered by a court of competent jurisdiction, in a suit between him and such foreign government, is also property; and that such a judgment can only be set aside or vacated by judicial proceedings between the same parties, and not by legislative action"—

is fatal to his case, for it has been shown by the terms of the convention and of the award itself, that the claim was properly presented as *La Abra Mining Company* v. *Mexico*, and that the award was rendered *on the claim* and *in favor of the claimant.*

Specific Claims were submitted to this Joint Commission, and awards made thereon are the property of the Claimants.

First. The convention of 1868 described the claims to be submitted to the Joint Commission as "claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the government of the Mexican Republic, arising from injuries to *their* persons or property by authorities of the Mexican Republic," etc. (Art. I.) It required the decision of the Commissioners and of the Umpire to be "given upon *each claim* in writing;" and the Presidents of the two republics engaged to consider the decision "as absolutely final and conclusive upon *each* claim decided." (Art. II.) Article IV provided "when decisions shall have been made by the Commissioners and the arbiter in *every case* which

shall have been laid before them, the total amount awarded in all the *cases* decided in favor of the *citizens* of the one party shall be deducted from the total amount *awarded to the citizens* of the other party, and the balance * * * shall be *paid* * * * to the government *in favor of whose citizens the greater amount may have been awarded*," etc.

Second. The method of docketing these claims in this "High Court" indicates that judgment was to be rendered in favor of individual claimants—"La Abra Mining Company *v.* Mexico, No. 489." As Mr. Marcy said in the commission of a similar nature, the American citizen was the "actor," Mexico the "reus." (*Supra*, 143, *note*).

Speaking of an award of the same Commission as made the award in La Abra case, this court said, per Mr. Justice Lamar: * "The claim there in controversy was *expressly* recognized as a *specific* claim by the Commission organized under the provisions of the treaty with Mexico;" and the court declared that the claimants had received "the sum *specifically awarded to them* by the Commission." (*United States* v. *Weld*, 127 U. S. 51.) It is in this opinion that the court distinguishes between awards such as these—"recognized as specific"—and gross sums paid by another government to ours in settlement of a class of claims *en masse*.

Sums so paid in gross by a foreign government on account of indemnities due our citizens are distributed by our Government among the citizens who have a moral claim to them. This court, referring to an indemnity paid in a lump sum by Great Britain to our

* Mr. Justice Lamar was a member of the Judiciary Committee of the Senate in 1880 when the nature of La Abra award and the question whether it could be submitted for review or modification to the Court of Claims was thoroughly discussed. (*Supra*, 21, 22.)

Government in pursuance of the Geneva award* said:

> "It was held in *United States* v. *Weld*, 127 U. S., 51, that this award was made to the United States as a nation. The fund was at all events a *national fund to be distributed by Congress as it saw fit.* * * * No individual claimant had, as a matter of strict legal or equitable right, any *lien upon the fund awarded*, nor was Congress under any legal or equitable obligation to pay any claim out of the proceeds of that fund. * * * While * * * there were no means of compelling Congress to distribute the fund * * * and while the claimant was remediless * * * nevertheless there was at all times a moral obligation on the part of the Government to do justice to those who had suffered in property." (*Williams* v. *Heard*, 140 U. S., 529.)

Now, as we have said, this court in the *Weld* case made a clear distinction between an award in gross, covering a class of claims, like the Geneva award, and an award upon a single specific claim, like La Abra's. Referring to the case of *Alling* (surviving partner of

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* This was a national indemnity paid for the breach of Great Britain's neutral obligations.

The Treaty of Washington was negotiated for the express purpose (Art. I) of removing and adjusting "all complaints and claims ON THE PART of the *United States;*" while the convention of July 4, 1868, with Mexico, was negotiated for the adjustment of "all claims ON THE PART of *corporations, companies,* or *private individuals, citizens* of the United States, upon the Government of the Mexican Republic, arising from injuries to *their* persons or property," etc. (Treaties and Conventions, 478).

But it must be remembered that the Treaty of Washington provided for *two* Commissions—one (Art. I) to settle "all complaints and claims ON THE PART of the *United States,*" and the other (Art. XII) "all claims ON THE PART of corporations, companies, or private individuals, citizens of the United States, upon the Government of Her Britannic Majesty * * * and all claims * * * on the part of corporations, companies, or *private individuals,* subjects of Her Britannic Majesty's Government, upon the Government of the United States," etc.

The Commission sitting under Article XII of this Treaty allowed to British subjects awards amounting in the aggregate to $1,929,819, which amount was appropriated by Congress "to pay the *sums awarded to British subjects.*" (18 Stats., 71.)

Belden & Co.), whose claim was adjudicated by the same Commission as La Abra's, Mr. Justice Lamar said (p. 56):

> "The claim there in controversy was *expressly recognized as a specific claim* by the Commission organized under the provisions of the treaty with Mexico, and was therefore dependent upon the treaty and grew directly out of it. In this case [*Weld's*] the reverse is true. The Treaty of Washington did *not* recognize this claim as a specific claim. The award of $15,500,000, directed to be paid by Great Britain, was to the United States *as a nation.* The text of the treaty itself speaks of the 'claims on the part of the *United States,*' and in article 7 the *gross* sum was 'to be paid by Great Britain to the United States.'"

The payment by Mexico to our Government of these specific awards was, to use the language of Attorney General Hoar (in a similar case—13 Op., 19), "*of course* intended to be *in trust* for parties whose claims should be ratified by the board."

Under a convention concluded October 14, 1832, for the settlement of claims growing out of the depredations inflicted upon American commerce by Murat during the years 1809, 1810, 1811, and 1812 (Treaties and Conventions, 1100, 1101), the King of the Two Sicilies obligated himself to pay to the Government of the United States 2,115,000 Neapolitan ducats. The payments were to be made in *nine annual installments,* a part to be applied to reimburse the United States for certain expenses incurred, which are mentioned in the convention, "the residue to be distributed amongst the claimants by the said Government of the United States in such manner and according to such rules as it may prescribe." (8 Stat., 442.) By Act of March 3, 1833 (4 Stat., 666), provision was made for a board of commissioners to receive all claims filed under

this treaty and make awards. Mr. Auguste Davezac, the United States Chargé d'Affaires at the Netherlands, who had been sent on a special mission in 1833 to the Kingdom of the Two Sicilies, transmitted to Mr. Louis McLane, the Secretary of State, in his dispatch of January 20, 1834, a copy of a communication from the government of the King, dated December 14, 1833, proposing to pay at once the amounts of the debts, less a discount of 25 per cent., instead of making payment in the nine years allowed by the treaty. (MSS. volume, Dept. of State, entitled "Naples—4.")

On December 26, 1833, Mr. McLane wrote to him as follows:

> "Having learned incidentally from a communication from Mr. Livingston that you had entered into a negotiation with the Neapolitan government for some alteration of the terms of the convention of the 14th day of October, 1832, without any instructions for that purpose, I have to express the surprise and regret which are felt by the President that you should have been induced to enter upon a subject of so much importance without previously ascertaining his views, and through the accustomed channel." (Then follow instructions requiring him to inform the government of the King that he was unauthorized to take any action in the matter.)

And he adds:

> "It may well be questioned whether this Government could by a new treaty vary the rights of the claimants, without their consent, as fixed by the existing convention, and until the claimants can be ascertained by the final proceedings of the commission such consent can not be given." (MSS. volume, State Department, entitled "The Netherlands, No. 14," pp. 10 *et seq.*)

On February 19, 1834, Mr. Davezac, replying to this instruction, assured the Secretary that he had entered

into no negotiation on the subject, but had merely transmitted the unofficial communication of the government containing the offer in question—which offer he had, since the receipt of the Secretary's instruction, declined.

President Jackson, referring, in his sixth annual message, dated December 1, 1834, to this offer, said:

> "The first installment due under the convention of indemnity with the King of the Two Sicilies has been duly received, and an offer has been made to extinguish the whole by a prompt payment—an offer I did not consider myself authorized to accept, as the indemnification provided is *the exclusive property* of individual citizens of the United States." (3 Messages, &c., of the Presidents, 98.)

Then Congress passed a bill authorizing the compromise of the claims allowed by the Commissioners under the treaty.

President Jackson's main objection to this bill, which he returned to the Senate, March 3, 1835, without his signature, was that *it impaired a vested right.* The debt due by the King, said the President, was "the *private vested property* of the citizens of the United States," to whom it was awarded. "*Neither the executive nor the legislature can properly interfere with it without their consent.* With their consent the executive has competent authority to negotiate about it for them with a foreign government—an authority Congress can not constitutionally abridge or increase." (3 Messages, &c., of the Presidents, 146.) That case and the one at bar are almost identical, for it is not conceived that *certificates* of award, such as were issued in the Sicilian and Venezuelan arbitrations, are anything more than evidences of the titles created by the awards themselves. For purposes of sale or assignment a certified copy of the award has always served as well as the certificates, which have in some cases been issued to the successful claimants.

Later (December 26, 1835), *a convention* was concluded for the payment in one sum of the balance of the indemnity, and it described the awardees as "the claimants *entitled* to the indemnity *by the* AWARD of the Commissioners" (*i. e.*, the domestic Board of Commissioners)—and it spoke of them as "having agreed" to the new arrangement. (Treaties and Conventions, 1101.)

The vested rights of the individual awardees in the Venezuelan awards were asserted, even more emphatically, by so eminent a jurist and statesman as Mr. Seward, who said, in a note to the Venezuelan envoy:

> "We are compelled, therefore, to decline any examination of the correctness of the decisions upon the *merits* of the several cases decided by the Caracas Commission, whether arrived at by the concurrence of the Commissioners or by the award of the Umpire, to whom the convention, in case of their disagreement, committed the final adjudication of the case. We must, for the same reasons, decline to examine the expediency of the *rules of procedure* by which the Commission thought proper to govern its investigations and the assignment of evidence [certificates] of its awards to the persons interested therein. *All such persons* may claim with show of reason, which it is difficult to refute, that they have *a vested interest in the awards*, indefeasible by the action of *either or both* the governments, *which surrendered to a common arbiter, without reserve, their entire jurisdiction in the premises.*" (Mr. Seward to Mr. Castro, March 3, 1869, Ex. Doc. No. 5, Sen., 41st Cong., 1st Sess., 7.)

Third. The award of Sir Edward Thornton, the Umpire (Record, 8, 10), "with reference to the case of 'La Abra Silver Mining Company *v.* Mexico,' No. 489," was "that there be paid by the Mexican government, *on account of the above-mentioned claim*, the sum of," &c. Further on, he said that the Mexican government was "bound to compensate the *claimants* for the losses which they suffered through the misconduct of the local authorities;

that *the claimants* should be reimbursed the amount of their expenditures;" and, referring to the ores on the patio, "that *the claimants are entitled to an award* upon this portion of the claim." (*Ib.*, 9).

Nothing more conclusively sets at rest the question of the individual property of the claimants to the awards made by this Mixed Commission than the judgment of the former Umpire, Dr. Francis Lieber, in the case of Samuel A. Belden & Co.

In that case, the United States had already paid, in 1855, to said Belden & Co., on account of their losses, over $18,000, and had taken from them an *assignment*, in writing, of their claim against Mexico, as security for the repayment of the amount so advanced, with interest. This is recited in the award by the Umpire, who concludes as follows:

> "Nothing in this award is to be construed as preventing the United States from *retaining* out of the gross sum awarded herein, as due that Government on said assignment, the aforesaid sum of $35,920.81—*paying to Belden & Co. the balance.*" *

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* See history of this claim in Alling *v.* United States, 114 U. S., 562. The whole award is as follows: (*Mss.*, Dept. of State.)

Wednesday, July 19th, 1871.

SAMUEL A. BELDEN & Co. *vs.* MEXICO. } No. 131, American Docket.

The Umpire, Dr. Francis Lieber, having decided that claimants in this case are entitled to an award, Mr. Commissioner Wadsworth delivered the following order and award of the Commission:

This case having been decided by the Umpire, and his opinion returned to the Commissioners, and it appearing that the claim had been promptly presented to the Mexican Government by the Minister of the United States resident at Mexico (Mr. Letcher), and subsequently by Mr. Conkling;

It is now ordered and awarded, that the government of the Republic of Mexico pay to the United States, *for and on behalf of claimants, Samuel A. Belden & Co., for 299 bales of tobacco*, the sum of thirteen thousand one hundred and fifty-four dollars and fifty-six cents, with interest from the 20th day of October, 1849, at 6 per cent per annum, and the further sum, for goods seized and sold

It was in reference to this award that section 1 of the Act of June 18, 1878 (20 Stats., 144), was inserted, which is as follows:

> "And in making such distribution and payment, * * * the proportionate amount of any award of which, by its terms, the United States *is entitled to retain a part*, shall be deducted from the payment to be made on such award, *and shall be paid into the Treasury of the United States* as a part of the unappropriated money in the Treasury."

Section 4 of that act requires the Secretary of State, in making payment of these awards, to deduct any sums of money that "may be *due to the United States* from any corporation, company, or private individual *in whose favor awards* shall have been made under the said convention."

Fourth. The executive and legislative departments of the Government considered this award as the private property of La Abra Company. This is shown as follows:

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under execution and loss attending same, of ten thousand dollars, with interest from March 6th, 1850, in the currency of the United States; making a total to July 10th, 1871, of fifty-three thousand and ninety-nine dollars and twenty-five cents (*i. e.* $53,099.25).

But as the United States paid to said Belden & Co., on the 27th of July, 1855, on account of his supposed losses, the sum of eighteen thousand three hundred and forty-seven dollars and twenty-eight cents, and took from them an assignment in writing of their said claim (now before us), which advance, with interest after the rate allowed claimants, amounts now to the total sum of thirty-five thousand nine hundred and twenty dollars eighty-one cents (*i. e.*, $35,920.81-100), *nothing in this award is to be construed as preventing the United States from retaining out of the gross sum awarded herein, as due that Government on said assignment*, the aforesaid sum of thirty-five thousand nine hundred and twenty dollars and eighty-one cents, *paying to Belden & Co. the balance*, viz., seventeen thousand one hundred and seventy-eight dollars forty-four cents.

There is also awarded $100 costs of printing, &c., in currency.

W. H. WADSWORTH, *Am. Comr.*

FRAN'CO G. PALACIO, *M. C.*
RANDOLPH COYLE, *Secy.*
J. CARLOS MEXIA, *Srio.*

(*a*) Mr. Fish, in his note of January 19, 1877, to the chairman of the House Committee on Foreign Affairs, drew attention to "the necessity of making provision for carrying into effect the *awards*" under the convention of July 4, 1868. He said:

> "An appropriation by Congress will be necessary for the payment of the amount of *the awards against the United States*, which sum, by the terms of the treaty, is to be deducted from the awards against Mexico and from the amount to be paid by Mexico. Provision should also be made for the distribution among the several parties *entitled* of the money as it may be received, and also for the *reimbursement* to the United States of the amount paid by the United States toward the joint expenses of the Commission, and which, by the terms of the treaty, is to be *deducted from the awards*." (Mis. Doc. No. 39, H. R., 44th Cong., 2d Sess., 1.)

Thus, before the Act of June 18, 1878, was passed, the individual claimants were recognized by the Department of State as "*entitled*" to the amounts awarded upon their claims, less expenses advanced by the Government.

Mr. Evarts, Secretary of State, also wrote to the same chairman of the House Committee on Foreign Affairs, November 6, 1877—

> "No doubt the prompt distribution of money *awarded to our citizens*, and paid over to the Government of the United States *for that purpose*, is an OBLIGATORY DUTY which this Government should be most anxious to discharge. All delay is *at the cost of the claimants*, as the Government does not charge itself with interest on the money in its hands."

Mr. Evarts then says:

> "I have, however, hesitated to make this distribution of the money on hand, *which would be in accordance with the practice of the Government* (*i. e.*, to distribute without any act of Congress), because of

some legislation being necessary to make good to the fund the amount with which the Government of the United States is *chargeable.*"

Congress adopted the suggestion of the Secretaries by including in the second section of the Act of 1878, above cited, an appropriation of the proper amount, being, in the language of the act, "the aggregate * * * of the awards made under the said Convention * * * in favor of citizens of the Mexican Republic against the United States, and having been deducted from the amount awarded in *favor of citizens of the United States.*" This section declares that these sums, "*when paid to the Secretary of State*" * * * "shall be regarded as *part of the awards* made under the said treaty." Nothing could be more preposterous than the idea that the Government could be a debtor to a fund of which it was the owner.

(*b*) So in the Act of Parliament (18 and 19 Vict., cap. 77) for the distribution of the sums awarded to British subjects by the Claims Commission, under the Convention of 1853, the individual awardees are described as "ENTITLED *under the awards of the said Commissioners* and Umpire." The act of Congress of March 3, 1855, appropriates the amount of $277,102.88, as "having been awarded by the Commission *to British subjects, claimants under the Convention,*" and provides for the retention of the sum agreed upon for expenses, "not exceeding five per cent. of the whole amount *awarded to both citizens of the United States and British subjects.*" (10 Stats., 703, 704.)

(*c*) The treaty negotiated in 1882, for the reopening and retrying of this claim, which failed in the Senate, provided in the 5th article for the preservation, at all events, of the rights of "any *bona fide* third parties who have, with the observance of due care and diligence, become

possessed of any portion of said claim, for a just and valuable consideration." (Ex. M. [Confidential], 47th Cong., 1st Sess., p. 4.)

The Umpire, in his denial of motions for a rehearing, had also recognized the absolute property of the claimants in these awards, and their assignability. He said:

> "The decisions of the Umpire, without his wishes being consulted, have generally been made public both here and in Mexico. It is known that by the convention they are final and without appeal. It is not impossible, and indeed it is very probable, that some of the claimants, *in whose favor awards have been made*, may have been able to obtain, on the credit of these final decisions, advances of money or other values, or may have sold and entirely signed away to other persons, not previously interested in the claims, the whole amount of the awards. * * * There is no doubt that what is supposed, on the faith of the convention, to be a final decision of *a claim* would give *the claimant* a credit of which he would be able and likely to avail himself." (Ex. Doc. No. 103, H. R., 48th Cong., 1st Sess., 126.)

The capacity in which the President or Secretary of State holds money received from foreign governments in satisfaction of awards upon the claims of individual citizens was considered in Congress upon a bill authorizing the Department of State to distribute a fund known as the "Venezuelan accretions." These accretions consisted of interest and premiums realized on Government bonds in which Mr. Fish had invested funds received from Venezuela on account of the awards made to our citizens by the Caracas Commission. A report from the Senate Committee on Foreign Relations was made by Senator Turpie on this subject in April, 1894, in which, after stating that the interest and earnings of the fund followed the principal, the learned Senator said:

> "The Government of the United States received

and held the moneys in question only for one purpose—to disburse them to *its own citizens in liquidation of their claims as adjudged against Venezuela.* It *neither had* nor claimed any proprietary right therein, or any other interest, save that involved in the expenditure thereof.

"The *real owners* and beneficaries of the fund are that class of claimants whose claims were allowed under the provisions of the treaty by the Commission created thereby.

"Taking into consideration the respective positions of the three parties to the transaction—Venezuela, the United States, and the claimants under the treaty—the first is the payor, the last are the payees, and the United States was, and is, *a naked trustee or bailee of the fund for purposes of distribution.*" (Sen. Rep. No. 330, 53d Cong., 2d Sess., p. 2.)

Congress adopted this view, and the "accretions" were distributed accordingly. (28th Stat., 635.)

The language of the convention of 1868, and all the proceedings under it, bring the award of La Abra Silver Mining Company within the principle stated by the distinguished Senator. Every word of it is applicable to this case.

So in the Act of Congress of August 3, 1894, providing for the distribution of the interest and premiums accruing on the Virginius indemnity fund, it was declared and provided (28 Stats., 223):

"That the said sum, being the earnings of a fund which was paid to the United States *in trust* for the purpose of relief of the families of those of the ship's company and of such of the passengers as were citizens of the United States * * * *is* THE PROPERTY *of the beneficiaries of said original fund*, and the Secretary of State is hereby directed to distribute the same, together with all accretions thereof, accrued and which may accrue, among those persons who have already substantiated their right to participate in said fund, their heirs, or legal representatives,

under and by virtue of executive orders heretofore issued and published."

The case at bar is much stronger than this, for the amount due on the Company's claim, instead of being determined by an executive order, was adjudicated under the treaty of 1868 by a Mixed Commission organized for the express purpose of adjudicating such claims, and the award, until set aside in the manner provided by the law of nations, is part and parcel of the treaty, and is to the Government, the Company, and all concerned "the supreme law of the land."

All the conventions to which our Government has been a party for the settlement of individual claims by Mixed Commissions recognize the individual claimants as the parties pecuniarily interested in the result, by providing that there shall be a written decision specifying what is to be paid on each claim (as in the Claims Convention of 1853 with Great Britain (10 Stat., 990), and in that of 1868 with Mexico), or that a certificate of the award on each claim shall be given to the respective claimants (as in the conventions with Costa Rica, New Granada, Ecuador, Venezuela, and other countries).

But in whatever manner the rights of the individual claimants are recognized as the eventual payees, payment is made in the *first instance* to the Secretary of State or other proper representative of their government, for in these international adjustments governments deal directly with each other and not with each other's subjects or citizens. Prudential considerations require this practice, even in cases where the treaty would seem to require direct dealing with the citizen.

In all such cases, "the government," as Mr. Attorney General Legaré said, "is a mere stakeholder for the use of those who are *really entitled* to the proceeds paid over under a treaty." (4 Opin., 177.) A case arising under

Art. VII of the Jay Treaty shows this, a case in which Mr. Attorney General Breckenridge advised (1 Opin., 154): "The government has only to see that the moneys are paid to those *in whose favor they were awarded*, or to those who are legally entitled *under them*." In other words, though the VIIth Article of the treaty required the British government (Treaties and Conventions, 385) "to cause the same [the award] *to be paid to such claimant* in specie, without any deduction, at such places," etc., yet payment was made by Great Britain to our Government, which thereupon distributed the funds to the parties in interest.

On the other hand, where, by the convention of 1853 with Great Britain, it was agreed that all moneys awarded by the Commissioners, on account of any claim, *should be paid by one government to the other*, it was held that the moneys found due from the foreign government to the claimants, who were citizens of the United States, were to be paid to the Secretary of State, whose duty it was to have the same paid *to those entitled to receive them*." (2 Whart. Dig. Inter. Law, p. 703, citing 10 Opinion Atty. Gen., 31.) In both cases government pays to government, and the recipient pays the individual awardees.

But the Government contended below (29 Ct. Clms., 459)—

> "That the specific moneys whose disposition is directed by Act of Congress of December 28, 1892, to be determined in this suit, were *moneys of the United States*, and were not, before the passage of that act, subject to *any right—legal, equitable or moral*—of defendants thereto."

This was based upon the following statement of Mr. Chief Justice Fuller in *Boynton* v. *Blaine* (*supra*):

> "Under this convention it was the balance that was to be paid, after deducting from what was found

> in favor of one government that which was found in favor of the other. So that the moneys paid in liquidation of that balance belonged to the United States, to be increased by appropriation to the extent of the amounts allowed Mexico, and the aggregate to be distributed to the claimants as might be provided."

But, as we have shown, it was not "what was found in favor of one *government*" that was deducted from what was found in favor of the other (because the awards were not to the United States or to Mexico), but, in the words of the convention, it was the sum total of the awards in favor of Mexican *citizens* that was deducted from the sum total of the awards in favor of *United States citizens.* *

And this was merely a method of bookkeeping or adjustment of accounts, adopted for convenience, but, as Mr. Bayard afterwards said, exceedingly inconvenient in practice.† The method adopted was in substance, if not in form, the same as if the United States had paid in cash to Mexico the sum total of the awards in favor of Mexican citizens and Mexico had paid in cash to the United States the sum total of the awards in favor of our citizens.

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* The total amount awarded in all the *cases* decided *in favor* of the *citizens* of the one party shall be deducted from the total amount *awarded to the citizens* of the other party, and the balance * * * shall be paid * * * to the Government in favor *of whose citizens* the greater amount may have been awarded," etc. (Art. IV.)

The same phraseology is used in Art. III of the supplemental convention of November 20, 1874, extending the time of the Commission; and yet again in Art. III of the convention of April 29, 1876, extending the time of the Umpire. (Treaties and Conventions, pp. 707–709.)

† He reported to the President:

> "The result was merely to produce intricacy in the accounts of the two Governments, without the pecuniary liability of either being in any degree diminished." (Senate Doc. No. 109, 50th Cong., 1st Sess., p. 4.)

It has already been shown that the Department of State would have distributed the proceeds of the awards without any action on the part of Congress if an appropriation had not been necessary to restore to the fund the amount retained by Mexico for the awards in favor of her citizens against the United States.

The claims convention of December 4, 1868, with Peru (16 Stats., 751–756) was the same as that of July 4, 1868, with Mexico, except that there was no provision in the Peruvian case for striking a balance and paying the difference, or expressly requiring that the award should be "in favor of citizens," as in the Mexican case. Nevertheless—as the convention with Peru was expressly for the settlement of individual claims—the sums awarded on the claims of our citizens were paid by the Peruvian government to the Secretary of State, and by him paid over to the individuals entitled without any authority from Congress. In this arbitration there was but one award against the United States on a claim of a Peruvian citizen, and Congress made an appropriation for its payment, *designating the individual awardee by name*, as follows (16 Stats., 313):

> "To pay the government of Peru the sum of fifty-seven thousand and forty dollars in coin, being the amount *awarded to Esteban G. Montano* by the Joint Commission at Lima, Peru, acting under the claims convention between the United States and Peru of December 4, 1868."

So under the claims convention of August 7, 1892, with Chili, which required the cases to be decided "upon such evidence or information only as shall be furnished by or on behalf of the respective governments," and payment to be made "by the one government to the other," the sums awarded on claims of our citizens were paid by the Chilian government to the Secretary of State, and

by him paid over to the individuals entitled without any act of Congress authorizing such payment. And in neither Convention was there any provision for distribution other than the usual covenant between the high contracting parties "to give full effect to such decisions without any objections, evasions, or delay whatever." (27 Stats., 965–971.)

This long-continued practice of the Secretary of State, acting for the President, and the sales and assignments of such awards, or interests therein, which have been made by individual awardees, and recorded and carried into effect by the Department of State for nearly a century, are utterly incompatible with the idea that the United States is the beneficial owner of such awards, or holds their proceeds otherwise than as trustee.

But to return to *Boynton* v. *Blaine*, it appears from the language used by the learned Chief Justice, that he did not mean to say that "the moneys paid in liquidation of that balance belonged to the United States" *absolutely*, but, "*to be increased* by appropriation to the extent allowed Mexico, and the aggregate *to be distributed to the claimants* as might be provided." It can not be supposed that by the words, "as might be provided," it was intended to suggest that the act of Congress would not provide for the distribution in exact accordance with the awards.

It is unnecessary to say that the awards could not be altered or modified in that way, and we have already shown, by reference to the act itself, that it recognized the title of the claimants to the amounts awarded to them by the Commission, and provided for distribution accordingly. It is only by stopping in the middle of the sentence quoted from the learned Chief Justice, and suppressing the words by which he qualifies and explains the ownership of the money by the United States, that the construction contended for below can be main-

tained. There is no doubt but that against all the world, except the individual awardees, or those claiming under them, the moneys received from Mexico "belonged to the United States;" but, in the words of the Chief Justice, "to be increased by appropriation * * * and the aggregate to be distributed to the claimants, as might be provided." If the moneys had belonged to the United States absolutely, why should they be increased by appropriation and paid to the claimants at all, instead of being covered into the Treasury, as public moneys are required to be by law?

As said by this court in *Comegys* v. *Vasse* and *Phelps* v. *McDonald*, *supra*, there is no element of grace or donation in the recognition of such claims, and governments do not give away public moneys arbitrarily to individual citizens, at the expense of the body politic.

That this is the true construction of what the learned Chief Justice said, appears from *Frelinghuysen* v. *Key*, *supra*, in which the court held—

> "the whole purpose of the convention was to ascertain how much was due from one government to the other on account *of the demands of their respective citizens.*"

The cases cited by the Government (*Rustomjee* v. *The Queen*, L. R. 1 Q. B. Div., 487, and L. R. 2 Q. B. Div., 69, 73; *Burnand* v. *Rodocanachi*, L. R. 7 App. Cas., 333; *Great West. Ins. Co.* v. *The United States*, 21 Ct. Clms., 206, and 112 U. S., 193), all related to the disposition of lump sums or awards in gross, and not to specific awards upon individual claims.

The court seems to have thought that there was an award in gross under the Convention of July 4, 1868, and that this total or lump sum was awarded to the United States, thus bringing the Company's claim within the principles on which *Rustomjee* v. *The Queen*, *Burnand*

v. *Rodocanachi*, and the *Great West. Ins. Co.* v. *United States* (*supra*), were decided.

The court said (*Record*, 342) that the Company sought to maintain—

> "that upon the recovery of a *gross sum* upon the part of the *United States*, including the *claim of the Company*, a right became inherent in the Company," etc.

But the Company never sought to maintain any such proposition, for no "gross sum" was awarded to the United States, nor was *any* sum awarded to it except that to which it was entitled under its assignment from Belden & Co. (*Supra*, 152.)

The court also said (*Record*, 340), referring to the United States:

> "*It* is the party *in whose favor the award was made.*"

And the court speaks of this as a case (*ib.*)—

> "where one of the powers to an arbitration questions *an award in its favor.*"

This error is the basis of the court's decision.

The court was also mistaken as to the facts in *Rustomjee* v. *Regina* (*supra*), on which the Government relied for the doctrine that the United States had absolute control of the funds in question. Referring to that case, the court said (*Record*, 344):

> "In the treaty the sum of $3,000,000 was paid by China to England as part of the proceeds of *an international arbitration* in satisfaction of certain claims due British subjects for wrongs committed against their property while resident in China. The sum was paid in gross, *but the claim in question constituted a part of the basis on which the allowance of $3,000,000 was made.*"

On this it may be remarked (*a*) that there was no "international arbitration" in the case, but merely a payment

by China to Great Britain as a result of direct negotiations; (*b*) that the payment was made on account of debts due to British merchants by certain insolvent Chinese merchants, known as the Cohong, who had been licensed by the Chinese government, and with whom the British merchants had been compelled to deal; (*c*) that there had never been any judicial, diplomatic, or other exact ascertainment even of the gross amount of the Cohong's debts to British merchants; and (*d*) *that the Cohong had never recognized Rustomjee as one of its creditors.*

Referring to the treaty,* Lord Coleridge said:

> "The sum is paid in gross or in the rough, not as the *ascertained* total amount, but '*on account* of debts due to British subjects by Chinese merchants who are said to owe not 'three millions of dollars,' but '*very large sums of money*' to British subjects." * * *
>
> "*No specific sum was ever ascertained, either between the two governments or between the British government and the suppliant,* as the amount of the suppliant's claim, and it is plain that *no such specific sum was ever considered between the plenipotentiaries who negotiated the treaty.*
>
> "It is not, *therefore,* correct to say, as the suppliant does in his petition, that this money was ever paid to the plenipotentiaries of the Queen 'for the purpose of paying his claim.'"

Lord Justice Blackburn said:

> "It is impossible to say that because a man had sent in a claim * * * against a Hong merchant, and that *had never been investigated,* the Queen after receiving these $3,000,000 was bound to hand over the amount claimed, or that her ministers could be *justified* or *excused* in handing it over to the man *without investigation as to whether his claim was right or not.*"

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* 30 British and Foreign State Papers (1841–'2), p. 390.

Rustomjee had no standing at all, because, as already stated, his claim had never been recognized or finally passed upon by the Cohong. On this point, in the appeal, Lord Coleridge, C. J., said (2 Q. B. Div., 69, 72):

> "While the correctness of the claim was under investigation [in China], and *before*, according to Chinese practice, *any result was arrived at, or the amount of it was ascertained or admitted between the suppliant and the parties from whom he claimed*, the Chinese war broke out, and the suppliant, with other British subjects, was expelled from China."

One case could not be more clearly distinguished from another than Rustomjee's from the case at bar; for the essential element lacking in the one is the chief characteristic of the other.

Nor does the case of *Burnand v. Rodocanachi* (*supra*) afford any better support to the appellee's contention. That case concerned an award made by the Court of Commissioners of Alabama Claims, payable out of the gross sum paid under the Treaty of Washington for violation of the neutral obligations of Great Britain (*supra*, 147). The judgment of the Commissioners was for the value of the cargo over and above the amount received from the insurer, who had paid the insured as for a total loss.

The act of Congress (18 Stats., 247) provided (*a*) that if such compensation or indemnity should not have been equal to the loss or damage actually suffered, allowance might be made for the difference, and (*b*) that no insurer should share in the fund unless he showed to the satisfaction of the Commissioners that during the rebellion the sum of his losses, in respect to his war risks, had exceeded the sum of his premiums or other gains in the premises. The English court decided that the insurer could not recover from the insured, because the latter, as

one of the learned justices expressed it, had received the money, under the act of Congress and judgment of the American court, *to keep for himself.*" (7 App. Cas., 344.)

This was simply a recognition of the power of Congress, which the appellant has never questioned, to dispose of a lump sum or gross award, as its sense of justice might dictate. But it is precisely from a case like that and *Rustomjee's* that this court in *United States* v. *Weld* (*supra*), distinguishes a case like La Abra's, in which, to use the words of Mr. Justice Lamar, the award of the Commission was "that the Mexican government should pay to the United States, *on account of the claim, a specific sum of money.*" This is La Abra's case in a nutshell.

The other case on which the complainant relies to sustain the proposition that the proceeds of awards, "whether paid in lump, or in specific sums apportioned to each claim," belong to the Government (29 Ct. Clms., 461), was the *Great Western Ins. Co.* v. *The United States*, 112 U. S., 193. But this, like *Rustomjee* v. *Regina* and *Burnand* v. *Rodocanachi* (*supra*), involved a lump sum or award in gross, a share of which was claimed by the plaintiff, and not an award upon a single specific claim, like La Abra's. The case went off on the question of jurisdiction under § 1066, R. S., and this court declined "to express an opinion on the legal or moral obligation of the Government in the matter," but Mr. Justice Miller, who delivered the opinion, remarked, with reference to the exclusion of cases arising under treaties from the jurisdiction of the Court of Claims:

> "This limitation of the jurisdiction of the Court of Claims is in accord with *the uniform course of the Government in dealing with claims of our citizens against foreign governments.* In such cases * * * mixed commissions, composed of arbitrators appointed by each party, and an Umpire, have

> usually been created by a treaty which made the award of the commission obligatory."

The award in this case is one of that kind. The learned justice proceeds:

> "In cases like that of Guadalupe Hidalgo and the Treaty of Washington, under which the present claim arises, where the foreign nation pays or agrees to pay to this Government a *fixed* sum in discharge of a *class* of claims which is the subject of treaty, Congress has provided a commission at home to pass upon the claims asserted under the treaty."

Thus the distinction is made clear; for, as has been shown, there was no "fixed sum," agreed upon beforehand, to be applied to the payment of the awards under the convention of July 4, 1868, as in the treaty of 1819 with Spain or of Guadalupe Hidalgo with Mexico; but each award, under the convention of July 4, 1868, was to be paid in full and not *pro rata* out of a previously determined sum total, and each claim was to be examined and adjudicated separately upon its merits. Nor was the adjudication limited to "a *class* of claims," but "*all* claims on the part of corporations, companies, or private individuals," etc., were to be adjudicated. And the adjudication was not to be by a domestic board, or "commission at home," appointed solely by the United States, as it was under the treaty of 1819 with Spain and of Guadalupe Hidalgo with Mexico, but by a mixed or international tribunal in which both nations were represented, with a third, or umpire, in case of disagreement.

The whole object of a domestic commission for distributing a lump sum, like the Geneva award, is to do justice to the individual citizens concerned. But by means of a Mixed Commission two objects are accom-

plished at once—the international liability is ascertained, and the validity and amount of each individual's claim are judicially determined.

Fifth. This award, being the exclusive private property of La Abra Silver Mining Company, could not be divested, except by the judgment of an international tribunal established for proper cause by agreement between the two governments for the purpose of reviewing the awards.

This principle of international law was stated by Mr. Fish in the controversy with Venezuela, as follows:

> "You will say to the government of Venezuela that the President regards such a tribunal, established by the joint acts of two independent nations, in the exercise of one of the highest powers of sovereignty, as clothed with an authority (as to each case that comes legitimately before it) of which they can not be divested, *except by the joint act of both contracting parties*, and of which it ought not to be divested, except where manifest fraud is exposed. It is not enough that in some cases error of judgment, mistake of law, or irregularity of proceedings is shown; *the contracting parties take the risk of such error, mistake, or irregularity, and agree to abide the findings of the Commissioners, notwithstanding them.* Nations create and resort to such tribunals only because there is no other tribunal capable of sitting in judgment upon such questions. It is the duty of every Christian statesman to jealously guard their decisions from insinuations and assaults and to maintain their integrity. It is incumbent on whoever would set aside a *judgment* which is the only substitute, in the dealings of nations, for the issues of war, to establish clear charges of fraud within a reasonable time, and by *as conclusive proof as would be required to set aside the decision of a court of last resort.*" (Mr. Fish to Mr. Partridge, May 25, 1869, Ex. Doc. No. 176, H. R., 41st Cong., 2d Sess., 6, 7.)

Among the rules of international arbitration, "mostly

derived," he says, "from the civil law," Halleck lays down the following, with a long list of authorities:

> "A decision once formally delivered *can not be reconsidered without a new agreement*, for, when the opinion is delivered, the arbitration is *functus officio*." (Halleck's Inter. Law, Ch. XII, "International Disputes," p. 293.)

This court, by Mr. Chief Justice Waite, said in *Frelinghuysen* v. *Key*, 110 U. S., 63, 73, that—

> "The opinion of the Attorney General in the Gibbes' case, (13 Op., 19), related to the authority of the executive officers to submit the claims of Gibbes to the second commission after it had been passed on by the first, *without any new treaty between the Governments to that effect*."

In his third annual message to Congress (1883) President Arthur spoke of Mexico's charges against the Weil and La Abra awards as having "*made a new Commission necessary*." (II Wharton's Dig. Inter. Law, § 220, p. 558.) The convention for a review of these awards was then pending in the Senate.

As authority for the proposition that the awards could be reviewed only by a convention for a rehearing of the claims, Dr. Wharton cites Mr. Bayard's report of May 6, 1886, to the President, in which the following observations of Mr. Chief Justice Waite in *Frelinghuysen* v. *Key* are italicised:

> "Under these circumstances it is, in our opinion, clearly within the discretion of the President to withhold all further payments to the relators *until the diplomatic negotiations between the two Governments are finally concluded.* * * *
>
> "All we decide is that it is within the discretion of the President to negotiate again with Mexico in respect to the claims, and that *as long as the two Governments are treating on the questions involved*, he may

properly withhold from the relators their distributive shares of the moneys now in the hands of the Secretary of State." (II Wharton's Dig. Inter. Law, § 220, p. 562.)

In the same report Mr. Bayard referred to the provision in the Act of June 18, 1878, that "it should be lawful for him (the President) to withhold payment of said awards, or either of them, until such case or cases should be retried and decided *in such manner as the Governments of the United States and Mexico may agree.*"

> "The retrial of these cases was, therefore [said Mr. Bayard], subject to such international arrangement as might be agreed upon between the Governments of the United States and Mexico." (II Wharton's Dig. Inter. Law, § 220, p. 563.)

The rule of public law on this subject was stated as follows by Sir Frederick Bruce, late her Britannic Majesty's Minister at Washington, as Umpire, under the convention of 1864, between the United States and Colombia:

> "In civil courts an appeal lies to a superior tribunal; in international courts, which recognize no superior judge, *fresh negotiations are opened and a fresh commission appointed, to which the disputed cases are referred.*" (Journal of the Mixed Commission between the United States and New Granada, MSS., Dept. of State, p. 162.)

Dr. Wharton cites *Comegys* v. *Vasse* (1 Pet., 212), as authority for the following proposition:

> "The decision of an international tribunal over matters as to which it is made the supreme arbiter is final, and is not the subject of revision *except by the consent of the contesting sovereigns.*" (II Dig. Inter. Law, sec. 221, p. 572.)

On this point, Dr. Wharton also cites Mr. Bayard's report referring to the report of the Senate Committee

on the Judiciary, No. 172, 46th Cong., 2d session, as follows:

> "The substance of this report is that the result of an arbitration authorized by an international convention should not be defeated or controlled by *the separate action* of one of the two governments, but that *the proper remedy was in a new convention*, in which provision should be made for doing justice to all claimants." (Dig. Inter. Law, Vol. II, p. 562.)

The course which has been taken in the case of La Abra is discussed in the *Révue Générale de Droit International Public* (Paris, July–August, 1898), under the title of "En Matiere de Sentence Arbitrale," by Mr. A. Mérignhac, professor of International Law in the University of Toulouse, and author of *Traité Theorique et Pratique de L'Arbitrage International.*

Referring to the manner in which the two nations agreed in the first instance to submit to arbitration the claims, among which was La Abra's, the learned author expresses the opinion that if these rules were deemed useful and were observed in concluding the Agreement of 1868, they ought equally to have been followed in investing the United States courts with the right to revise the award rendered by the Umpire. And he adds [translation]:

> "To go to the root of the matter, in fact, *the consent of the two parties*, as we have already said, *should have been followed by a new agreement creating a superior court of arbitration.* The President of the United States was not compelled to ask Congress, as he did, to complete the work of the Executive. He ought himself to have negotiated with Mexico, directly, the organization of a new arbitration which could easily, with the consent of the Federal Senate,*

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*It seems that Mr. Mérignhac was not aware that in 1882 the President *did* negotiate a convention for rehearing the claim, and that it was *rejected by the Senate.*

have been referred, as was the case, to the American courts. And the President of the Mexican Republic was authorized to consent to the proposal, when made to him, with the approval of the Senate of his country. Hence, as may be seen, *the creation of the American Courts as a superior Tribunal of Arbitration appears to us to have been wrong, in consequence of a mere defect of form and a false application of the constitutional law of the country. In these matters, however, the form is the more important, in that it is the absolute safeguard of the subject-matter.*"*

The court will respect the law of nations (*The Nereide*, 9 Cranch, 388, 400, 420, 433, 449; *The Estrella*, 4 Wheat., 298, 311; *United States* v. *Percheman*, 7 Pet., 51, 87; *Jecker* v. *Montgomery*, 13 How., 498, 516; 1 Ops. Atty. Genl., 27; *In re Dillon*, 7 Sawyer, 561), and one of the principles of that law is that the result of an arbitration authorized by an international agreement can only be set aside for well-established reasons by a new Convention providing therefor. The grounds for such review are given *supra*, 83–87. To these may be added Bluntschli, who, in his Droit International Codifié, sec. 495, p. 261, says (Paris ed., 1870):

"La décision du tribunal arbitral peut être considérée comme nulle:

"(*a*) Dans la mesure en laquelle le tribunal arbitral a dépassé ses pouvoirs;

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* This award can only be reviewed, as this learned author intimates, under a diplomatic agreement between the two governments. This kind of negotiation is *wholly* intrusted by the Constitution to the President of the United States, and to the Secretary of State, acting on his instructions. (Act July 27, 1789, 1 Stat., 28.)

A comparison of this Act of 1789, creating the Department of Foreign Affairs (now the Department of State), with the earlier act passed under the Confederation in relation to the conduct of foreign affairs clearly proves that *all the power of Congress* over such matters was considered as transferred by *the new Constitution to* the President. (See 1 Stat., 28, note.)

"(*b*) En cas de déloyauté et de déni de justice de la part des arbitres;

"(*c*) Si les arbitres ont refusé d'entendre les parties ou violé quelque autre principe fondamental de la procédure;

"(*d*) Si la décision arbitral est contraire au droit international.

"Mais la décision des arbitres ne peut être attaquée sous le prétexte qu'elle est inexacte ou contraire à l'equité. Les erreurs de calcul peuvent toujours être rectifiées."

Chancellor Kent, from whose opinion in *Van Cortlandt* v. *Underhill* we have cited so freely (*supra*, 80–83), in regard to the finality of domestic awards, says in his Commentaries on the Law of Nations, referring to the grounds, as laid down by Heffter, on which international awards may be assailed:*

> "On this statement of grounds of objection, two remarks may be made: First, that they should rather be termed *excuses* for not taking up an award that may turn out different from what was expected; and secondly, that if Vattel's rule of laying down precisely the subject of the dispute, the propositions and the counter propositions, be rigidly adhered to, *there can be no legal reason* (always assuming that a competent, upright, and impartial arbitrator is selected) *for setting the award aside.*" (Abdy's Kent's Inter. Law, 156.)

* Heffter's grounds of objection, cited in Abdy's Kent (*supra*), are as follows:

"*Firstly.* If given without any sufficient agreement to refer, or beyond the terms of the agreement.

Secondly. If given by arbitrators who turn out to be utterly incapable.

Thirdly. If the arbitrator or the other (that is, the successful) party has not acted in good faith.

Fourthly. If the parties, or one of them, have not been understood.

Fifthly. If the judgment relates to things not in dispute.

Sixthly. If the terms are absolutely at variance with the rules of justice, and can not therefore form the object of any agreement.

Sixth. Subject to the right of the Government to reopen this award and retry the claim in pursuance of an international agreement in the manner thus described and for the reasons stated, this award is the individual property of the Company, wholly free from legislative control, except so far as it, like all other private property, may be liable to taxation or to be taken under the exercise of the right of eminent domain for just compensation. It was the clear intent of the convention of 1868 that, subject to the exception mentioned, the President should receive and distribute these awards to the parties in interest. To this end he covenanted with the President of Mexico (Art. II) to give *full effect* to the *decision* in *each case* without any objection, evasion or delay whatsoever, and by that covenant bound himself to cause the money received from the Mexican government to be paid to the awardee or his assigns; for "full effect" can be given to an award in favor of a citizen only by paying to him the sum awarded. Otherwise the award to such a citizen and the convention for the settlement of his claim would be a delusion and a snare.

Moneys of the United States can not be "drawn from the Treasury but in consequence of appropriations made by law." Under our system of government the power of the purse is, as this clause of the Constitution indicates, lodged in Congress; but it must, nevertheless, be remembered that there are moneys collected by executive officers which are not deposited in the Treasury, but on the contrary are applied by them without any direction whatever from Congress.

Halleck says (International Law, 788), speaking of the revenues collected in enemies' territory in our possession:

> "*Being no part of the moneys of the Treasury of the United States, their expenditure is not regulated by the*

general laws of the United States, but by the direction of the President of the United States, under whose authority they were collected."

The President, also, as the organ for conducting the foreign affairs of the nation, has, from the very beginning of the government, through the Secretary of State, received from foreign governments sums in satisfaction of injuries inflicted by them upon our citizens, and distributed them directly to the injured parties, their agents or assigns, without any act or intervention of Congress.

Recently, and presumably because of the great increase of responsibility cast upon the Department of State as the custodian of these funds—often of very large amounts—which must be safely guarded, a change has been effected by legislation requiring their deposit in the Treasury, still subject, however, it will be observed, to the sole orders of the Secretary of State, as regards their distribution.

This act (29 Stats., 32), approved February 26, 1896, requires that "hereafter all moneys received by the Secretary of State *from foreign governments* and other sources, *in trust for citizens of the United States*, or others, shall be deposited and covered into the Treasury," but it provides for the payment by the Treasury from these trust funds upon certificates of the Secretary of State. All indemnities paid by foreign governments to the Secretary of State, in satisfaction of injuries to our citizens, are thus expressly declared to be *trust funds*. The Secretary of State determines to whom these shall be paid and the amount to be paid, the Treasury being merely the custodian of the funds. For bookkeeping purposes it was necessary to raise an appropriation in advance, permanent in character and indefinite in amount, against which the certificates of the Secretary of State should be charged, and such an appropriation is found in the act.

In the recent arbitration between Italy and Colombia, the moneys paid by Colombia to Italy on account of the award made by President Cleveland, on the claim of Ernesto Cerruti, have been attached in the hands of the Italian government at the suit of Cerruti's creditors in Rome. (For. Rels., 1895, Part II, 957 *et seq.*; MSS. Dip. Corr. [Italy] Dept. State, 1897–'8.)*

This court, in *Phelps* v. *McDonald* (*supra*), noticed the fact that in a case arising under the Treaty of Guadalupe Hidalgo (*Clark* v. *Clark*, 17 How., 315)—

> "where the contest was between the bankrupt and his assignee, *touching a fund in the Treasury derived from a foreign government*, the Secretary, though not a party, *was enjoined from paying it over until the rights of the contestants were settled in the suit then pending.*"

It may be said that this injunction was granted under section 8 of a special act of Congress (9 Stats., 394), but, nevertheless, it was a clear recognition of the transferable rights of property on the part of individual citizens in the awards of the Commission.

The appellant having a vested right of property in the award, as has been shown, the Act of December 28, 1892, and the proceedings under it, take from it that right, contrary to the provision of the Constitution of the United States which declares that "no person shall * * * be deprived of * * * property without due process of law." (Vth Amendment of the Constitution.)

This fundamental principle is violated by a legislative act which attempts to divest a property right in a manner in which it could not have been divested by the law

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* This is a fact of which the court may take judicial notice, and for information as to which it may consult the Department of State. (*Jones* v. *The United States*, 137 U. S., 202; *Underhill* v. *Hernandez*, 168 U. S., 253.)

of the land existing at the time of the vesting of the right.

Due process of law was meant "to secure the individual from the *arbitrary* exercise of the powers of government, unrestrained by the established principles of private right and distributive justice." (Bank *v.* Okely, 4 Wheat., 235, 244; Giozza *v.* Tiernan, 148 U. S., 657; Duncan *v.* Missouri, 152 U. S., 377; Missouri Pac. R. Co. *v.* Mackey, 127 U. S., 205; Leeper *v.* Texas, 139 U. S., 462; Hurtardo *v.* California, 110 U. S., 516, 535, and cases cited.)

Mr. Chief Justice Fuller said in Giozza *v.* Tiernan, *supra*, speaking of the "due process" clause, "Undoubtedly it forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all under like circumstances in the enjoyment of their rights."

In *Murray* v. *Land & Imp. Co.*, 18 How., 272, 276, 277, this court said:

> "It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a *restraint on the legislative* as well as on the executive and judicial powers of the Government, and can not be so construed as to leave Congress free to make any process 'due process of law' by its mere will. To what principles are we to resort to ascertain whether this process enacted by Congress is due process? To this the answer must be twofold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to *those settled usages and modes of proceeding existing in the common and statute law of England* before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

We trust it has been sufficiently shown that the settled

usages and modes of proceeding known to municipal law as well as to the Law of Nations have been widely departed from in the trial of the right of property in this proceeding authorized by the Act of Congress of December 28, 1892.

But it was contended for the Government below (29 Ct. Clms., 465) that—

> "The act of 1892, to the extent of the appraised value of La Abra claim, provides a method of 'just compensation' for its release to Mexico."

The "*claim*" was "appraised" more than twenty years ago by an international court of competent and exclusive jurisdiction, and was merged in the award rendered by Sir Edward Thornton under the convention; and it can not now be "appraised" again in any such proceeding as this. Nor can "just compensation" for the "claim," or "for its release to Mexico," be the object of a suit by the United States in which it denounces the claim as fraudulent and seeks the entire subversion of the award.

ARGUMENT ON THE FACTS.

IX.

The Court of Claims erred in not dismissing the bill on the ground that the alleged fraud was neither properly charged nor proved by the complainants.

In regard to the complainants' charge of fraud, the court says (*Record*, 816):

> "It must be conceded that the fifteenth paragraph of the bill, by its *general allegations*, presents the substantial issue in this proceeding, and if those allegations are sustained, the complainants are entitled to decree as prayed for in the bill."

As to the burden of proof, the court held, as matter of course, that it was upon the complainants (*Record*, 817):

> "The respondent having an award of the Umpire, is entitled to the full benefits of that award, unless it is shown by sufficient proof that, within the meaning of the statute giving this court jurisdiction, the award, or some substantial part thereof, was obtained 'by fraud effectuated by means of false swearing or other false and fraudulent practices on the part of said company or its agents, attorneys, or assignees.' *The burden is upon the complainants to satisfy the court that the award made by the Umpire was the result of fraud as indicated by the statute.*"

Recurring again to the XVth paragraph of the bill, the court says (*Record*, 817):

> "The pleadings reduced to their logical results, and the scope of the testimony circumscribed to its proper limits, bring the contention of this voluminous case to *the compass of the fifteenth paragraph of the bill.*"

The court then gives the substance of paragraph XV, and says:

> "The *general statements* of this paragraph, taken in connection with other portions of the pleading *more specifically* charging the fraud, may be treated as the *embodiment of the issues to be determined in this proceeding.*"

Paragraph XV of the bill is (*Record*, 15):

> "Your orator further shows that, in fact, the said defendant La Abra Silver Mining Company was not compelled by threats or acts of Mexican officials or people to abandon its said mines as stated in said memorial and in the proofs submitted by said defendant Company in support of its said claim, on or about the 20th day of March, 1868, or at any other time, but that said claim was a sheer fabrication, and every material allegation in said memorial con-

> tained was a falsehood, and that all the material testimony upon which said claim was allowed and said award was made was false, and known to be so by all the witnesses giving and swearing to the same, and by the said defendant Company when it caused the same to be exhibited as true to said Commissioners, and that the whole of the said award was obtained by fraud, effectuated by means of false swearing, subornation of witnesses, and other false and fraudulent practices on the part of the said defendant Company, its agents, attorneys, and assigns."

We will first examine this paragraph, and then the "other portions of the pleading more specifically charging the fraud" in the XVIth paragraph of the bill.

The opening statement of the XVth paragraph—

> "that, in fact, the said defendant * * * was not compelled by threats or acts of Mexican officials or people to abandon its said mines as stated in said memorial"—

is merely the opinion of the pleader, positively expressed, that the United States Commissioner and the Umpire were mistaken in coming to the contrary conclusion. After stating the view which he took of the conduct of the Mexican authorities and people from the evidence before him, the Umpire said in his award (*Record*, 9):

> "In short, the Umpire does not see what else, in presence of such opposition to their efforts, the claimants could do but abandon the enterprise."

The statement—

> "that said claim was a sheer fabrication, and that every material allegation in said memorial contained was a falsehood"—

although so sweeping, is radically defective as a charge of fraud for lack of precision and certainty. What *are*

the material allegations contained in the memorial? That the memorialist was a Company duly organized under the laws of the State of New York; that it purchased mines and erected works, and extracted ore and expended large sums of money in Mexico? All this is admitted. That the Prefect and the local magistrates interfered with the Company's work, and issued the orders produced in evidence? But the genuineness of these orders was admitted by the Mexican agent at the original trial, and by the Mexican Commissioner in his opinion rejecting the claim, and by the complainants in this suit. So that, as said by the learned Chief Justice of the Court of Claims in his dissenting opinion (*Record*, 850)—

> "There is but one way by which they can have the international question re-examined, and that way is by alleging and proving that the orders and letters * of the Mexican officials, upon which the Umpire relied, and which made the international case presented to him, *never existed*, and that the award was obtained by fraud effectuated not by perjury, but by forgery."

There is thus not only a lack of the circumstantiality and definiteness which the law requires in charging fraud, but no such fraud as meets the exigencies of the case is charged in the bill, and the decree of the Court of Claims is nothing but an expression of an opinion by the majority of the judges that the United States Commissioner and the Umpire did not properly determine the effect of these orders and letters and of the other evidence before them.

That, however, is the very question which the court

* Translations of these papers, accepted as correct by both parties, are printed in the opinion of the court on the merits. (*Record*, 829, 830.)

asserts, in the most unmistakable terms, was not submitted to them under the act (*Record*, 817):

> "We are not sitting as a court of review to determine whether upon the proof offered and admitted the award is to be sustained or justified by the weight of testimony, but whether it was procured by false testimony or fraudulent practice upon the part of the respondent.
>
> "*We are not to determine the question as to whether the Umpire found against the weight, or* GREAT *weight of the evidence*, but whether the award is the result of fraud and perjury upon the competent testimony."

The XVth paragraph of the bill charges, at the close:

> "That the whole of the said award was obtained by fraud, effectuated by means of false swearing, subornation of witnesses, and other false and fraudulent practices on the part of the said defendant Company, its agent, attorneys and assigns."

But *what* was the fraud that was so "effectuated," and what particular part of the evidence, on which the United States Commissioner and the Umpire relied, was false and fraudulent, and what witnesses were suborned, and who suborned them, and when, and where, and by what means?

The requirements of the law in this regard are stated by a standard text-writer as follows:

> "In suits instituted for the purpose of impeaching transactions on the ground of fraud, it is essential that the nature of the case should be distinctly and accurately stated. A mere general charge of fraud without alleging specific facts, is not sufficient to sustain the bill. It must be shown in what the fraud consists and how it has been effected. The fraud alleged must be set forth specifically in particular and in detail, so that the person against whom it is charged may have the opportunity of knowing what he has to meet and of shaping his de-

fense accordingly." (Kerr on *Fraud and Mistake*, Bump's ed., 365, 366, citing in the notes, in addition to the English cases, *Harding* v. *Handy*, 11 Wheat., 103; *Conway* v. *Elliston*, 14 Ark., 360; *Pendleton* v. *Galloway*, 9 Ohio, 178; *Spence* v. *Duren*, 3 Ala., 251; *Bell* v. *Henderson*, 6 How. (Miss.), 311.)

In *Beaubien* v. *Beaubien*, 23 How., 190, the court per Mr. Justice Nelson said:

> "The particular acts of fraud or concealment should have been set forth by distinct averments, as well as the time when discovered, so that the court may see whether by the exercise of ordinary diligence the discovery might not have been before made. (*Stearns* v. *Page*, 7 How., 819; *Moore v. Greene*, 19 How., 69.)"

In *Stearns* v. *Page* (*supra*) the court said:

> "A complainant, seeking the aid of a court of chancery under such circumstances must state in his bill distinctly the particular act of fraud, misrepresentation, or concealment—must specify *how*, *when*, and in *what manner* it was perpetrated. The charges must be definite and reasonably certain, capable of proof and clearly proved."

In *Knox* v. *Harshman*, 133 U. S., 155, the court said, by Mr. Justice Gray:

> "The allegation that the record of the judgment as it stands is a gross fraud upon the judgment debtor is in terms, as it must be in legal effect, *limited to the particulars specified in the bill.*"

In *United States* v. *Atherton*, 102 U. S., 372, Mr. Justice Miller said for the court:

> "A bill in chancery to set aside a judgment or a decree of a court of competent jurisdiction for fraud must set out distinctly *the particulars of the fraud*, the *names* of the parties who were engaged in it, and the *manner* in which the court or the party injured was misled or imposed upon. * * *

"It is at war with the whole character of proceedings in courts of equity to call in aid its extraordinary power to set aside on these allegations such a solemn public record as a patent of the United States." (Citing *Marquez* v. *Frisbie*, 101 U. S., 473.)

In *Ambler* v. *Choteau*, 107 U. S., 586, it was said by Mr. Chief Justice Waite, for the court (p. 590):

"While the allegations of fraud in their general terms are as broad as language can make them, specifically they are confined by other allegations to the use of the patented invention in Missouri by the Missouri corporation of which the defendants are stockholders and directors. * * * The words 'fraud' and 'conspiracy' alone, no matter how often repeated in a pleading, can not make a case for the interference of a court of equity. Until connected with some specific acts for which one person is responsible in law to another, they have no more effect than other words of an unpleasant signification. While in this case the offensive words are repeated often enough, the facts to which they are applied are not such as to make the defendants answerable to the complainant for the damage and other relief that he asks."

So in *Clodfelter* v. *Hulett*, 72 Ind., 137–144—

"The use of epithets, however bountifully multiplied, will not supply the place of facts."

And in *Ockenden* v. *Barnes*, 43 Iowa, 609—

"Fraud is never sufficiently pleaded except by the statement *of the facts on which it is based.*"

The following English authorities on this subject are cited in Chitty's *Equity Index*, vol. V, pp. 5195–5197:

"Evidence of alleged conversations between witness and the defendant, in which the defendant admitted that he had defrauded the plaintiff, rejected because not put in issue." (*Farrell* v. ———, 1 Moll., 363.)

"Evidence of confession of fraud must be rejected if not put in issue by the pleadings. A general charge of fraud is not sufficient to entitle such evidence to be heard; it must be set out particularly, and the person to whom made, so as to give the party to be charged the opportunity not only of denying the fact, but of discrediting the witness. And, although in issue, no decree will be made upon such evidence of admission without sending a case to law." (*Mulholland* v. *Hendrick*, 1 Moll., 359.)

"It is the duty of the court, in suits for the cancellation of agreements on the ground of fraud, to maintain the principle that no relief be given unless a sufficient case of fraud is distinctly alleged in the pleadings and proved as alleged." (*Martin* v. *Westbrook*, 7 L. T. N. S., 449.)

"The bill must show not merely of what the alleged fraud consists but how it has been effected." (*New Brunswick & Canada Railway & Land Co.* v. *Conybeare*, 9 H. L. Ca., 711; 31 L. J. C. H., 297; 10 W. R., 305; 6 L. T. N. S., 109.)

"A general charge of fraud is to be referred to and explained by the particular allegations of fraud which the bill contains; but if there be no definite or specific charge of fraud, a vague charge where the facts alleged may or may not amount to a fraud, will not sustain the bill upon demurrer." (*Mundy* v. *Knight*, 3 Hare, 497; 8 Jur., 904.)

"A bill stated that by fraudulent collusion between the defendants colluding and confederating with various other persons, certain documents had been secreted, and certain income fraudulently appropriated by the defendants—*held* on demurrer, that these charges of fraud were too general and that specific acts of fraud must be charged." (*Bothomly* v. *Squires*, 1 Jur. N. S., 694.)

"Loose allegations in a bill of fraudulent concealment on the part of the defendant not stating what the facts are which were concealed, will not support a bill on demurrer. In order to sustain a bill to set

> aside an agreement on the ground of fraud, the plaintiff must aver on the face of the bill specific acts of fraud which he is prepared to prove, and tender an issue on those facts." (*Bainbridge* v. *Moss*, 3 Jur. N. S., 58; affd. 3 Jur. N. S., 62.)

There is no excuse for any indefiniteness in this case. The very same question of subornation and perjury was before the Commission and the Umpire upon testimony given by Granger's mistress (Cecilia Jiminez), Granger himself, Ralph Martin, Alonzo W. Adams, Carlos F. Galan, and other witnesses. (*Supra*, 128, 129.) Take the case of the last-named witness: he testified specifically as to the conduct of General Adams in respect of the two depositions (those of Loaiza and Gamboa) which are said to have been perjured and suborned; and, if Galan's testimony is true (and the appellants have no doubt of its truthfulness), the Company's agent was unimpeachable in this matter and the Mexican authorities were guilty of the most iniquitous practices. Galan was no ordinary witness—he had been Governor and chief justice of Lower California before his deposition was submitted to the Commission, and he had become a Senator of the Mexican Republic when, in 1877, the Mexican government entered into its contract with General Slaughter, of Alabama, and Soto's son-in-law (James Granger) for the procurement of evidence that would subvert the award. But Mr. Attorney General did not charge in his bill, and the Court of Claims did not find as a fact, that Galan had perjured himself.

And even if Galan had been impeached, this would still have left untouched *Soto's* orders, and his unlawful seizure of the Company's lower hacienda, and the imprisonment of the Company's last superintendent in the pest-house by the other local magistrate, and his final departure in fear of his life.

Take the case of *Chavarria*, who, like Galan, was a man of high position in Mexico, and whose testimony, if true (and the appellants have no doubt of its truthfulness), justified the award, and required, on the part of Mexico, either the prosecution of the prefect, Mora, for his abuse of the Company, as tesified to by Chavarria, or Chavarria's prosecution for perjury.

The late Mr. Jeremiah S. Black, who was of counsel for La Abra Company, drew the Umpire's attention to the nature of this witness' testimony, and to his high standing at the Mexican bar, as to which a distinguished Mexican judge and statesman had certified officially in this case.*

But the bill does not name Chavarria, and the Court of Claims does not find that he was foresworn. On the contrary, his testimony seems to be accepted by the court as entirely trustworthy, although (it is respectfully submitted), if its full significance had been apprehended, the decree must have been for the Company, at least to the extent designated in the dissenting opinion of the learned Chief Justice.

Referring to the weight given by the Umpire to the testimony of this notable Mexican witness, the court say (*Record*, 831):

> "In this connection it is proper to note that the Umpire, in passing upon the questions submitted to him, said, in substance, that the superintendent took such steps as he could to obtain protection from the authorities; but finding his efforts in vain, he appealed through a lawyer of high character to the highest authorities in the State, who declined to interfere in the matter."

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* *Record*, 85: "Here follows the certificate of the court, stating that lawyer Jesus Chavarria is a resident of this city (Durango), one of its first lawyers, and, by his dignity and well-known integrity, that his deposition is, beyond all doubt, entitled to full faith and credit." (See, also, *ib.*, 92.)

Dealing here with the very gist of the case, the court proceeds:

> "As applicable to that statement, the deposition of Mr. Chavarria may be referred to. By his deposition *it is shown* that some time in July or August, 1867, he was at the mines of the Company at Tayoltita, and had communication with the local authorities of Mexico, and that as a result of his being in communication with Exall at that time he was employed to solicit from the State government of Durango protection for the Company; that he made application to the authorities of the State of Durango for that purpose, but it availed nothing. The only answer given was that the government of the State would not interfere in private matters.
>
> "His deposition tends to show *that great prejudice existed in the minds of the people against the Company, and that that prejudice was participated in by the local authorities.*"

But it was not merely or chiefly in regard to "great prejudice" that Chavarria's testimony related, or was relied upon by the Umpire, although, even in that respect, the finding of the court is directly opposed to the allegations in the bill (*Record*, 16)—

> "That there was no hostility towards said defendant * * * on the part of Mexican officials or people, but that, on the contrary, their relations to its officers were friendly."

It was not only the "great prejudice" against the Company and its unsuccessful appeal to the governor of Durango for protection and redress, but also the cause of this appeal, that were proved by Chavarria. This cause was the illegal interference and oppression, taking the form of a conspiracy among the local magistrates, of which the Company was the victim in Mexico. This was pressed upon the attention of Sir Edward Thornton by Judge Black, who in his closing argument for the Com-

pany before the Umpire, referring to "the eminent Mexican lawyer," Jesus Chavarria, observed:

> "This latter witness proves an *actual agreement and conspiracy among the local authorities* to arouse the people against the Company, and eventually to drive them out of the country. Marcos Mora, the Gefe Politico, and Macario Olvera, his successor in that important office, were both engaged in the plot."

This was a remarkable statement, and it was pressed upon Sir Edward Thornton's attention by Judge Black, with characteristic clearness and vigor.

To quote again from his argument before the Umpire:

> "Here we beg your special attention to the testimony of Don Jesus *Chavarria*, who was a distinguished Mexican lawyer of character wholly unimpeachable. He explains not merely the nature and extent of the wrongs suffered by the Company, but the *animus* with which they were committed by the Mexican officials. We call the special attention of the Umpire to this evidence, which will be found on pages 90–96 of the 'Printed Book.'* *This case can not be decided against the claimant without pronouncing Chavarria a perjured man.*"

Again we inquire: Why did not the bill allege and the Court of Claims find that Chavarria was guilty of perjury? He testified that he visited the Company's mines at Tayoltita, with the Prefect Mora, in July or August, 1867, that he conversed with the Prefect upon their condition and—

> "*Became satisfied that both that officer and the mining people were strongly bent upon annoying and driving the Abra Company away, and with which they were continually provoking quarrels;* that officer and some

* This "printed book" contained the testimony on *both sides*, which had been translated and printed at great expense for the use of the Commissioners and Umpire by La Abra Company.

of the workmen stated that *they believed the Company to be annexationists; that it was therefore hateful to Mexico, and they thought it best to drive it* (a)*way from that mineral* (*district*) *anyhow;* that, for this purpose, the authorities instigated the laboring people, on the pretext of their wants, not to work for the Company; that he further knew that the Company's ores were frequently stolen, and that it was not legally protected by the Gefetura, where the superintendent usually made fruitless complaints of the thefts; that that officer (the gefe) also gave him, deponent, to understand that *he had a special interest in the expulsion and despoliation of the Company, in which case he intended to denounce the mines at Tayoltita, and he offered deponent a share in them,* which deponent refused, and reproved his conduct in permitting the operatives to steal the ores, which they did with impunity to the great responsibility of the authorities of that department, who, either by their connivance or indolence, compromised the honor and good name of the Republic." (*Record*, 81.)

Chavarria also testified that he met another of the officials, Macario Olvera, on the road from San Dimas to Gavilanes (*ib.*, 82)—

> "That they conversed together upon the subject referred to in the question, and *Olvera acknowledged to him the plans and intentions existing at Tayoltita, on the part of the authorities and the operatives,* to injure and expel the Abra Company from their mines by intrigues, or such direct and indirect means as it would be impossible for them to resist, and that *Olvera revealed to deponent that he was interested in that hostility, and in combination with the gefe politico* (*Prefect*) *whom he was going* to replace, to carry out the sinister projects before referred to."

Then, referring to a meeting of the Company's workmen which was held at Tayoltita during this visit, and

at which the Prefect, Mora, and the witness were present, Chavarria said (*ib.*, 82)—

> "That the greatest disorder prevailed upon that occasion; that the head miners, by order of Marcos Mora, mutined against the Abra Company and the superintendent; they refused to work any longer in the mines, which resulted in the continuance and increase of the robbery of the ores, which was openly carried on in daylight and in presence of the superintendent." *

Chavarria, who lived at Durango, and had been counsel for Mora, testified further (*ib.* 82)—

> "That, subsequent to the time referred to in the question, he conversed with Macario Olvera, in Durango, and also with Marcos Mora, on his frequent visits to him when he was in prison, and was told *that the Company had finally been compelled to abandon their mines at Tayoltita, through the loss of their property, owing to the concerted hostility against it in March of 1868.*"

The learned counsel for the Government were familiar with this testimony and that of other witnesses—many of them citizens of Mexico—corroborating it; and if they believed that it had been suborned, and that the perjury and subornation could be proved, they would have made the specific charges in the bill which the law requires in such cases.

As already observed, the Court of Claims said of Chavarria's testimony that it tended to show—

> "That great prejudice existed in the minds of the

* On this point the superintendent (Exall) testified in his first deposition before the Commission (*Record*, 32):

> "Large quantities of silver ore was taken or stolen from our mines after we had taken it out, and such were the threats against us that we did not dare to go out and defend it, as we would have been in great danger of losing our lives by so doing. The ores so taken were the very richest, and those containing the largest amount of silver."

For references to the other evidence on this point see *supra*, p. 3.

people against the Company, and that that prejudice was participated in by the local authorities."

But the court said nothing of the *conspiracy* or the *overt acts* against the Company, to which Chavarria testified, and which were proved by other unimpeached testimony before the Commission. The court, however, does refer to the orders of Guadalupe Soto, the local magistrate at Tayoltita, issued by him in obedience to instructions which he had received on the 3d of June, 1867, from his superior officer, the Prefect Mora, at San Dimas. These orders were part and parcel of the scheme to drive the Company out and compel the abandonment of its property by making it impossible for it (as the Umpire found) to prosecute its enterprise with any comfort or safety at Tayoltita. Referring to these orders and the Prefect's letter of July 10, 1867, the court says (*Record*, 831):

> "In the troubles incident to the disagreement the Mexican authorities failed to protect the officers and the rights of the Company to the extent they were entitled to, but that such failure was for the purpose of driving the Company away and getting possession of the mines does not appear as alleged by the respondent."

That is, the court either discredits that part of Chavarria's testimony and the other evidence corroborating it, or differs from the United States Commissioner and the Umpire in regard to the effect which should be given to it. But the question is: Has the complainant proved that the award was obtained "by fraud, effectuated by means of false swearing or other false and fraudulent practices on the part of the said La Abra Company, its agents, attorneys, or assigns?" That this is the sole question submitted to the court by the jurisdictional act, and that the case is not to be tried again on the merits, the court itself repeatedly asserts; but whenever it withdraws its

attention from the act and takes up the question of fraud, it departs from its own prescribed course, and considers the probabilities of the case, upon evidence which it truly describes as voluminous and conflicting, and substitutes its own opinion—another chancellor's foot—for that of the Umpire. (*Supra*, 91, 92.)

The court calls the action of the officials a failure to protect the Company, but it was worse than that—it was an illegal aggression—a lawless usurpation on the part of these officials themselves, and its purpose was to be inferred from its nature, even if there had been no testimony as to the expressed intentions and motives of the wrongdoers. This was brought out clearly in the argument of Judge Black before the Umpire (*Record*, 746):

> "The Exhibits V, W, X and Y are admitted to be authentic documents, for they are acknowledged by the judge who issued them. The learned Mexican Commissioner does not deny their authenticity, though he questions the accuracy of the translation of them made by Mr. Tripler, the official translator of the Commission. But before any discussion of the effect of these extraordinary papers it must be considered that by the laws of Mexico the *gefe politico* had no jurisdiction or authority whatever in any matters of dispute between the operatives of a mine and the owners of the same.* The *deputacion de mineria*, established by law in every mining district, alone had jurisdiction in such cases, and the interference of the *gefe politico* or the local judge was of itself an arbitrary and illegal act."

But there is ample evidence of the expressed *animus*

*The Government offered no proof of the mining laws of Mexico in this suit, but the respondent cited those laws, in force at the time, from a recognized authority on the subject, corroborating the statement made by Judge Black in his argument before the Umpire. It should not be forgotten that Sir Edward Thornton had served for many years in Mexico, was an accomplished Spanish scholar, and, as an international judge, could take judicial notice of the laws prevailing in Mexico upon any subject before him.

and purpose of the local magistrates outside of these papers—evidence which was before the Commissioners and Umpire—and that has not only not been impeached but has been corroborated and strengthened since the Commission adjourned.

It was in evidence before the Commissioners and Umpire that *the local magistrate (Soto) who issued the orders (under instructions from the Prefect, Mora) took possession of the entire property of the company—aided and abetted by his son-in-law, Granger—upon Exall's departure,* and remained in possession for several years. Now, the court may have thought that because Granger was there with Soto the Company was in possession, but it did not seem so to the U. S. Commissioner or to the Umpire, who knew, from the testimony, that Granger remained at the mines after Exall's departure, and undertook, in Exall's name, but without the knowledge or consent of the Company, to extend for seven months the lease of the lower hacienda which Exall, before his departure, had made—as he said—to placate Soto. That Granger had business as well as family relations with Soto, and went over to the Mexican side in this case, was shown by the evidence before the Commission. Granger's letter of August 12, 1868, to the Collector of Taxes—which was not before the Umpire—was written in the interest of Soto, who was then operating the works he had erected at the lower hacienda, under an extension of the lease just mentioned. This extension was made so as to give some color of right to the intruding magistrate who had at that time taken possession of all the Company's property. Granger's statement in that letter of August 12, 1868, that the superintendent (Exall) would return in November, was false, and known to Granger to be false, because Exall had informed Granger in letters written from New York in May and June, 1868, that he had left the employment of the Com-

pany, that his accounts had not yet been settled, that he had commenced suit, and that Garth (the treasurer of the Company) had told him he was disgusted and would do nothing more. These letters, which formed a part of the "newly-discovered" evidence produced by Mexico, were attached to Mr. Attorney General's bill and made part of it, but were excluded by the court on the ground that they were written *after Exall's connection with the Company had ceased.* (*Record*, 825.) This was equivalent to a finding that Exall was not superintendent at the time when Granger so described him, and it is apparent that the whole of Granger's statement is equally untrue.

Granger's purpose in writing that letter was to put the tax collector off, and it is to be observed that it was written a few days after the unauthorized extension of the lease of the lower hacienda, where Soto was at work reducing ores from the company's mines. (*Record*, 129, 132.)

But to return to Chavarria's testimony. The plot or conspiracy, and the overt acts on the part of the local officials, to which he testified, were corroborated by other witnesses—especially by Avalos, to whose integrity and trustworthiness a leading witness for Mexico (Capt. C. B. Dahlgren) testified in the strongest terms before the Senate sub-committee in 1889.* Three depositions of

* In his deposition of September 18, 1872, before the Claims Commission, Dahlgren said, in answer to question 16th (*Record*, 99):

> "I look upon Matias Avalos as a strictly honest, truthful, and trustworthy man. I have frequently entrusted him with large amounts of silver coin, which he has always brought safely to the Company from Mazatlan, and also with bullion from San Dimas to the mint at Durango and Culiacan, and he never, as many others have done, reported a loss, which he might have done without detection or suspicion; but his reports are always candid and truthful. He is regarded as a strictly honest, conscientious, and reliable man."

In his direct examination in the Senate investigation, Dahlgren testified that the foregoing was "perfectly correct," except that he had added a particular instance of Avalos' integrity and trustworthiness. (Rep. No. 2705, Sen., 50th Cong., 2d Sess., 667). On his cross-examination, Dahlgren testified as to Avalos that he

Avalos were before the Mixed Commission—one taken for the Company, May 23, 1870 (*Record*, 51–53), a second at the instance of the Mexican authorities, July 20, 1872, (*ib.*, 131, 132), and a third in rebuttal for the Company, September 10, 1872 (*ib.*, 93–95.)

In his first deposition, he told of a meeting of the Company's workmen at Tayoltita, evidently the one described by Chavarria, and added some other particulars, as follows (*Record*, 52):

> "At another time, I think in the month of July, 1867, when I was engaged in bringing down from the mines to the hacienda the ores belonging to La Abra Company, I met all the *barreteros* and men employed in and about the mines, going down to the hacienda, and the barreteros and all the other men stopped and talked with me, and they all said an order had been sent up to the mines by Marcos Mora, *gefe politico* of that district, to stop work, and ordering them all to Tayoltita. When I came down to the town, in the evening, the *gefe* was at the house of Gaudalupe Soto,* and *I heard the gefe, Marcos Mora, tell these men, a very large crowd of them*, that the Company did not work as he, the gefe, wanted them to work, and *employ all the men who were out of work at Tayoltita, and that he would not let any of them work if they did not employ all of them, and work all of their mines at the same time, as he had directed them to work; and he said at the same time that he was going to take the mines away from the Company, and give them to all of the people to work them as they pleased;* and that night, I remember well, I did not sleep at all, for the words used by the *gefe politico* to the crowd of miners were well intended and had

was "very reliable"—that he "never knew him to steal a sixpence or lie"—that "he was honest and brave" and "truthful." (*Ib.*, p. 711.)

* On the Company's ground close to the mill, where this local magistrate kept a liquor store and gambling saloon, at which the miners were wont to congregate. (*Record*, 498, 499.)

> the effect to incite the Mexican miners and men out of employment to riot, and perhaps to something much worse than that, and I expected serious trouble that night for the Company."

The testimony of Avalos was, of course, not satisfactory to the Mexican authorities, and they haled him into court at San Dimas, and, by methods such as Señor Galan described in his deposition, sought to obtain a retraction of his statement; and they forwarded to the Mixed Commission, through the Mexican agent at Washington, an alleged copy of his re-examination (*Record*, 131, 132). In a later deposition, taken before United States Consul Sisson at Mazatlan, Avalos reasserted the truth of his original testimony for the Company, and swore that he did "not wish to make the slightest alteration in it." At the time that he made this last deposition of his, he was in the service of Captain Chas. B. Dahlgren, and had come with him from San Dimas to Mazatlan. Dahlgren signed this deposition as subscribing witness, and, as already observed, himself testified, seventeen years later, before the Senate Investigating Committee, to the honesty, courage, and truthfulness of Avalos.

It is significant that when Avalos was re-examined by the Mexican authorities, they did not ask him any question about the occupancy of the Company's premises by the local magistrate, Guadalupe Soto, although he had testified, in answer to question No. 4 in his original deposition, that at that time (May 23, 1870) Soto and his family were occupying the Company's hacienda and property. (*Record*, 52.)

There can be no doubt that the testimony of Avalos, vouched for as he was to the Commission by Captain Dahlgren and by the captain's predecessor, Mr. Ralph Martin,* had great weight with the Umpire. But in-

* Ralph Martin, who preceded Dahlgren as superintendent of the

stead of having been impeached or weakened in the intervening decades, the testimony of Avalos has received additional importance from Dahlgren's renewed encomiums on its author in his examination under oath by the Senate committee.

Why did not the complainant in the bill charge Adams with having bribed Avalos to commit perjury? Was it because the agents of the Mexican Government, before the bill was drawn, had been compelled in the Senate investigation to withdraw certain infamous charges which they had made against General Adams as an officer of the United States army in the Mexican war and in the war of the rebellion? Or was it because their witness, Dahlgren, whose deposition for the Company they said had been *forged* by General Adams, broke down so thoroughly on his cross-examination, in the same proceedings, and was contradicted by one of the men (Danglada)—a Mexican at that—who saw him sign his deposition in the United States consulate at Mazatlan after it had been read to him and when it was fully written out?*

The charges of fraud and corruption in obtaining the testimony were made with far more definiteness by the Mexican agent before the International Commission than by Mr. Attorney General in this suit. (*Record*, 412, 413; *Supra*, 7, 8, 128, 129.)

Durango Mining Company at San Dimas, and who had employed Avalos said of him that "he was an honest, reliable man, of good, character for truth," and "was regarded there (as deponent believed) by all who knew him as an honest, industrious, and reliable man." (*Record*, 164, 165.)

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*The account of Dahlgren's examination contained in the minority report of the Senate Foreign Relations Committee, No. 2705, part 2, Sen., 50th Cong., 2d Sess., is printed in appendix III to this argument. The majority report does not mention the subject at all, although it is of such consequence in the case.

And these charges were found false by the Commission when the Umpire agreed with the United States Commissioner that the Company was entitled to an award. But we can not tell on what grounds the Court of Claims differs from the Commission on this question, because the court does not state any specific conclusion as to the witnesses or the testimony for the Company with respect to this question of fraud—the sole question which was submitted for determination to the court by the jurisdictional act. For example: Was Cryder's testimony regarding Exall's imprisonment true or false? Mexico's witnesses—Sloan and Fonseca—corroborated it. So did the entry of the fine in one of the Company's books—*produced by Mexico*—in this suit. Was the testimony of Galan, Chavarria, Avalos—any of the testimony without which the Umpire could not have made his award—perjured and suborned, as alleged in the bill? If the testimony on which the Umpire relied was suborned, who suborned it? The subornation must be brought home to the Company, "its agents, attorneys, or assigns."

Adams, Granger and Slaughter.

But the court say (*Record*, 825):

> "The evidence for the respondent which was submitted to the Joint Commission was taken by Alonzo W. Adams, who was employed by the Company after it was decided to prosecute the claim, under a contract that he was to receive, as a contingent compensation, one-third of the amount awarded by the Commission, and the books and evidence in the possession of Granger, who had been an employee of the Company, were procured by Mexico under a contract that Granger was to be paid the sum of $3,500 in case the claim was ultimately defeated.

> This condition being alike to both sides, the testimony comes before the court in at least a 'questionable shape.' It is insisted by counsel for the complainant that Adams, having the incentive of a large contingent compensation, was unscrupulous in his method and means of procuring testimony, while, upon the other side, it is insisted by counsel for the Company that Granger had every inducement to withhold testimony in favor of the Company and mutilate the books which he produced under his contract for contingent compensation.
>
> "Whatever may be said as to the manner in which either performed his duty toward his employer, it may be said that the terms of the employment were not calculated to induce the most scrupulous means of investigation; and, without criticism in detail, it may be said that *neither the agent of the Company nor the Mexican agents are without grounds of suspicion.*"

Is this such a finding of the fraud defined in the jurisdictional act, in respect to the man who was charged with committing it, as would justify the subversion of an international award more than a quarter of a century after the happening of the events in controversy? What becomes of the old rule of equity, that the fraud for which relief may be obtained against a final judgment must be such fraud as can be defined in the decree? Or of the other old rule, that the fraud must not have been in issue or triable before? The charges of fraud against Adams—not made in the bill—but in argument by counsel, so far as they touched the substance of the material evidence, or the manner in which it was obtained, were examined and finally determined by the Commission, as already shown. The court should, at least, have attempted to reverse the Umpire on this point—to justify its decree—and not have contented itself with putting Adams and "the Mexican agents" in the same category.

But the court erred otherwise in this matter. It is a serious error to say, as the court said (*supra*), that—

> "The evidence for the respondent which was submitted to the Joint Commission was taken by Alonzo W. Adams."

The deposition of Mr. Collins, president of the Company, on which the Umpire relied for the amount of the Company's expenditures, was not taken by Adams. Nor was Exall's—the first deposition in the case. This appears from the notice of Exall's examination which was sent to Mr. Cushing (the agent for Mexico) by Messrs. Britton & Ely, the Company's New York attorneys, Nov. 30, 1869. (*Record*, 667, 668.) One of the Company's Washington attorneys, the late Mr. Robert Rose, had several interviews with Exall, in New York, prior to his examination. Greene also was examined in New York. It was in *Mexico* that Adams obtained evidence for the Company in two separate visits—the first in 1870 and the second in 1872. He travelled with an interpreter, Lieut. Col. Francis Dana, and a military escort, and where the Mexican judges would examine his witnesses he examined them in the Mexican courts. Chavarria was examined in court at Durango, and his credibility and high standing at the bar and in the community were officially certified to by the presiding justice (*supra*). General Adams did everything above board as attorney in fact for the Company—he filed his power of attorney in the proper offices, and cited his witnesses before the judges for examination according to local procedure. (*Record*, 28, 76, 79, 91.)

Nor is it to be forgotten that much of the testimony on which the Umpire relied was furnished by the Mexican government, under the management of the Federal District Attorney Hernandez. The instructions of that official to the local judges were before the Commission. (*Rec-*

ord, 121–124.) He furnished Judge Quiros, before whom so many of Mexico's witnesses were examined, and who, himself, had been one of the most violent enemies of the Company, with a copy of Prefect Mora's order of June 3, 1867, and instructed him to examine that official and also Soto. But, although Soto was examined, Mora's testimony was not taken, by the Mexican government, and it was taken for the Company before Mr. Justice Barraza, on Adams' petition, in court, at Durango, on his second visit. The excuse given by Judge Quiros that Mora could not be found was, at least, "questionable," for General Adams found him in Durango—where Hernandez, the Federal district attorney, lived—and brought him into court by process of law. The parallel between Adams and Granger, suggested by the court, is only on the surface. Both were employed, as the court suggests, on a contingent compensation. But Adams was employed by a company whose only available property was the claim it had against the Mexican government, and there was nothing unlawful or improper in his employment to obtain evidence in Mexico, where the wrongs from which the Company had suffered were perpetrated. He did this legitimate work in the open, and went a second time to Mexico with instructions from the late Jeremiah S. Black—a jurist of renown—a good man—whose memory is precious to this court—a man who had been Attorney-General and Secretary of State of the United States, Chief Justice of his own great Commonwealth of Pennsylvania, and who was aided by other counsel for the Company, one of whom (Mr. Fred. P. Stanton) had been chairman of the Judiciary Committee of the House of Representatives and Governor of the State of Kansas. (*Record*, 658.) But Granger was employed by a debtor government to subvert an international award, in face of the solemn covenants of a treaty,

when it was known that he was "a very dangerous man;" that he had changed sides, and had forsworn himself, and was in straitened circumstances. (*Record*, 591.) And although the Company's books and papers, which were in his control in Mexico, could have been examined, and their money value appraised beforehand, the Mexican government made no previous examination of the documents, took no affidavit from their vendor as to their authenticity, completeness, or history during the decade that had elapsed since they were left at Tayoltita, and insisted on making the great bulk of his compensation dependent upon the entire subversion of the award by their instrumentality. (*Record*, 590.) There never was such an offense committed against arbitration and the peace of nations, or such a breach of diplomatic propriety and international morality as the contract between the Mexican government and Granger, except the contract between the Mexican government and Slaughter in this same case. When it was said of the Slaughter contract in the Senate of the United States (*Record*, 435) that—

> "There is not a respectable chancellor of the English-speaking race in Christendom, who, if such a contract as that were to appear at the bar of his court, would not throw out any case that came there with it"—

the distinguished jurist who used that language did not know that the means employed by that agent of Mexico, under that contract, were worthy of the contract itself—that the so-called "petition" of his which was prepared for him, and circulated privately among the members of Congress while the fifth section of the act of June 18, 1878, was under debate, was unverified—that it had never been presented in either House, that it concealed his contingent interest under his contract with Mexico, and that while it purported to tell "The Story

of the Mines" from the letter-book and the original letters, that Granger had produced, it garbled the records, giving what suited its purpose, and suppressing what supported the Company's claim.* The Slaughter contract was produced in 1889 before the sub-committee of the Senate Committee on Foreign Relations, but the

*After a series of misstatements, Slaughter says in his so-called "petition" (*Record*, 759):

"Your *petitioner* further shows—

"That he is now in possession of *original books* and reports of the said Company, and other papers covering the entire period of its operations and extending some months beyond the abandonment of the mines, from which a few extracts are hereto appended, marked Exhibit B."

Exhibit B is entitled "*The Story of the Mine*" (*Record*, 761), and is introduced as follows (*ib.*):

"*Your petitioner hereby tenders the proof of fraud to Congress and* prays that a thorough and impartial investigation of these claims may be had," *etc.*

In a foot note (*ib.*, 774), he omits a draft of $15,000 made by De Lagnel in May, 1867, which was paid by Garth in New York.

He omits De Lagnel's last letter from the mines to Garth, doubtless because "the story" did not suit his purpose. *This* "story of the mine," told by Mexico's chief witness, in the letter-book, and suppressed by "the petitioner," was (*ib.*, 262)—"*The mines are looking better, yielding more,* and I believe, *richer metal.*" The "petitioner" gives most of Exall's letter of July 13, 1867, but suppresses its continuation, written next day, in which Exall says (*ib.*, 272):

"*The officials are getting daily more troublesome; their demands are all foolish and very unjust,* but we have to do the best we can with them and take things as quietly as possible."

That was "the true story of the mine," but the "petitioner" had no more idea of telling it to Congress than of making an exhibit of his contract with the Mexican Government.

The "petitioner" also omits Exall's two letters of December 5, 1867, one to the Prefect and the other to Del Valle, complaining of *the illegal seizure of the Company's Guadalupe hacienda by Soto, one of the two local magistrates.* (*Record*, 278, 279.)

The "petitioner" also omits Exall's appeal of January 7, 1868, to the same Prefect for protection against the other local magistrate (Perez), who had illegally arrested him, and had threatened to shoot him (*ib.*, 280,281), and who, the next day, imprisoned him in a pest house.

It has already been noticed that this garbled and fraudulent statement of Mexico's "petitioner" was officially communicated to Mr. Evarts by Mr. Zamacona as "a printed extract containing a portion of the evidence which [Mr. Zamacona said] shows the fraudulent character of the claims in question." (*Supra*, 15, 16, and *note.*)

Granger contract was never disclosed till Gaona, the Mexican official who made it, under instructions from the Mexican Minister of Foreign Affairs, was examined in this suit.

Mexico's Failure to Prosecute the Alleged Perjurers.

The conduct of Adams as agent of the Company in Mexico was subjected to careful scrutiny upon testimony pro and con, and was judicially vindicated by a court of final and exclusive jurisdiction, organized under a convention between two nations. But Mexico's conduct, or that of her agents in this case, has received no judicial vindication, and is beyond apology or excuse. It can only be said that she is not on trial in these proceedings. But she is, or ought to be, for she has appealed to the United States in the name of honor and justice for relief from a pecuniary obligation, and, by her sponsor, she has come into equity to get back money, on the ground that the award against her was obtained by perjury, when the chief of the alleged perjurers—her own citizens, resident in her territory, and subject to her laws—have never been put upon trial in her courts, although there has been no impediment in the way of their conviction if guilty. (*Record*, 595, 596.) It would be in the highest degree impolitic and immoral to set aside the award under these circumstances. Mexico owed it to herself and the United States and the family of nations to prosecute the alleged perjurers who were within her jurisdiction, and she should have based her appeal, as the Umpire suggested, upon judicial proof of the alleged perjury. (*Supra*, 129.)

Mexico dishonors herself in making the charge, and

she is not to be believed, in the absence of such proof. An award, under a submission by individuals, whether the agreement was merely between the parties or made a rule of court, would not be opened upon such a charge of perjury. A case in point is cited by MORSE on *Arbitration and Award*, p. 615, as follows:

> "The allegation that a witness had wilfully given corrupt and false testimony before the arbitrator was once refused to be treated as a sufficient basis for a motion to set aside the award. For, it was said, the witness might be proceeded against for perjury, and *it would be setting a mischievous example* to interfere at that time."

That is, before the plaintiff had done his duty to the public, and had obtained judicial proof of the alleged perjury. In the case cited (*Scales* v. *East London Water Works*, 1 Hodges, 91), it seemed clear that there had been perjury, but in denying the motion, TINDAL, C. J., said:

> "At this moment, if the witness has forsworn himself, the plaintiff is not without remedy against him, but it would be setting a mischievous example to interfere at present."

PARK, J., said that by the late act proceedings might be taken against the witness for perjury, and the rest of the court concurred.

In a much earlier case, *Tovey* v. *Young*, Prec. in Ch., 193, the bill for a new trial at law was dismissed, though the plaintiff had discovered since the original trial, that the principal witness against him was interested, and the Lord Keeper said:

> "New matter may in some cases be ground for relief, but it must not be what was tried before; nor when it consists in swearing only, will I ever grant a new trial, unless it appears by deed or writing, or that a witness, on whose testimony the verdict was given, *was convicted of perjury*."

This case is cited by Chancellor KENT in the leading case of *Smith* v. *Lowry*, 1 Johns. Ch., 324.

The excuse that Gaona gave for the failure to prosecute Galan, *i. e.*, that he had been chosen Federal Senator and that the consent of the Senate was necessary, puts Mexico in a worse position, for, of course, if the Mexican government had believed that Galan had perjured his soul and betrayed his country in an international arbitration, it would have laid the proof before the Senate and that body would undoubtedly have given its consent to the trial. But the trouble was that Galan's testimony was true. He gave the names of his friends, the governor and other officials, who had such strange ideas of patriotism (*Record*, 188), and the presumption is that the Mexican government made inquiries of them, but they neither examined them in rebuttal nor prosecuted Galan. Chavarria was not a Senator, and no excuse is given for the failure to re-examine him (as Granger, Del Valle, and Avalos were re-examined) or to prosecute him for perjury after he had testified for the Company.

Failure of the Government to Produce the Witnesses Named in the Bill.

Now we come to the XVIth paragraph of the bill, to which the court refers as a further extension of the general allegations of fraud contained in paragraph XV. (*Record*, 15–18; 330–333.) But it will be seen on examination that this paragraph also is fatally defective as a charge of fraud for want of the necessary definiteness and circumstantiality. It is, in the main, a statement of what the Government undertakes to prove, and of the evidence by which such proof will be made, on the rehearing. There are thirty of these specifications, the falsity or immateriality of which was so clearly demon-

strated below, that the court felt bound to refer again and again to the XVth paragraph as raising the issue of fraud in the case. But this it utterly fails to do, as hereinbefore shown, on the highest authority.

Before specifying the facts, which it promises to prove, the Government declares, in paragraph XVI, (*Record*, 16):

> "That Charles B. Dahlgren, J. F. Gamboa, and J. M. Loaiza can and *will* testify that the affidavits purporting to have been made by them in support of said claim were false and were obtained by fraudulent practices."

But, despite the legal obligation to prove the fraud as alleged in the bill, Mr. Attorney-General did not put one of these witnesses on the stand, although, for aught that appeared, they were every one of them alive and accessible. Indeed, it appears in Birmingham's testimony (*Record*, 740) that he had met Dahlgren and conversed with him several times in New York while this suit was pending; and Torres testified (*Record*, 556) that he believed that Loaiza was still living at La Noria; while Gaona admitted (*Record*, 580) that he was informed as to the residence of one of the Gamboas.

This breakdown on the part of the complainant is all the more significant when the grave character of the charges made by the Mexican government on faith of alleged statements of these persons is considered. Affidavits of Loaiza and the two Gamboas are comprised in the so-called "newly-discovered evidence," which was used in the Department of State and in Congress to discredit the award, and are made part of the bill in this suit. (*Record*, 290–295.) Their falsity was shown from their own contents in the argument on the demurrer, and the complainant was afraid to produce

the affiants for examination, as promised by the bill, in the trial on the merits. As to Dahlgren, whose deposition for the Company was alleged—prior to this suit—to have been *forged*, his testimony, with that of Sisson and Danglada, before the Senate sub-committee in 1889, showed so conclusively that he had signed and sworn to his deposition after it had been fully written out and read to him, and made his subsequent perjury on Mexico's behalf so clear, that it is easy to see why, when the time came to examine him in this suit, the Government did not dare to produce him. An account of his examination, taken from Senator Brown's minority report, is printed in Appendix III to this Argument, and respectfully submitted to the consideration of the court, as an illustration of the manner in which the Mexican government and its agents in the United States attempted to subvert an international award, in the name of honor and justice, more than twenty years after the original cause of action arose.

Recurring to the affidavits of Loaiza and the Gamboas, it is to be observed that *they show on their face that the affiants were within Mexican jurisdiction all the time from May, 1870, when they were examined on behalf of La Abra Company, and another claimant, at Mazatlan, until June, 1877, when* this "newly-discovered evidence" was extorted from them by the Mexican authorities after the final adjournment of the Commission.

It appears from Galan's testimony (*Record*, 188–191), that these very witnesses were threatened with punishment by Governor Rubi for having testified in support of claims against Mexico, but no attempt was made to make them disavow or contradict their testimony while the Commission was in session, probably because it was apprehended that (as in the case of Avalos), they would be re-examined by the Company, and disclose (as Avalos

did) to the Commissioners and Umpire the fraud and duress by which the contradictory testimony had been obtained by executive and judicial officers of the Mexican government. So Mexico waited *seven years*, until the Commission was *functus officio*, and then, instead of coming into equity with judicial proof of the alleged perjury of her own citizens, came with false and fraudulent depositions, which were wrung from the witnesses in jail. (*Record*, 579, 580, 596.)

J. F. Gamboa says in this deposition of his, which was made seven years after his testimony for the Company before the Commission (*Record*, 292):

> "He received from Adams only $50 to go on his account to Cabazan and procure two false witnesses to testify on behalf of said claim, which deponent did *not* do."

Trinidad Gamboa says in his deposition (*Record*, 293):

> "Adams gave his brother, at San Ignacio, $50 to go to Cabazan and procure two false witnesses to testify in the same way, *but his brother did not do it.*"

The Umpire's award could not be set aside because General Adams had spent $50 in an unsuccessful attempt to obtain the testimony of "two false witnesses." But who were those false witnesses? Why were their names not given? What where they to testify? Where and before whom were they to be examined? And why was Gamboa to go to *Cabazan?* Did General Adams leave a matter of this sort to the memory and discretion of his messenger? And had his messenger forgotten all the necessary particulars? The story is not explicit enough, considering the time taken to concoct it, and it is not strange that the complainant did not produce the deponent for cross-examination in this suit.

General Adams was collecting evidence in Mexico under great difficulties (*Record*, 179, 180), and if he employed Gamboa to go to Cabazan, it was doubtless to look up some of the Company's former employees whose testimony he desired to obtain in support of the Company's claim.

General Adams died many years before this suit was brought, and prior to the Senate investigation of 1888–'89, but in 1874, after his return from Mexico, he answered under oath before the Commission the charges of fraud that had been made against him (*Record*, 177–186), and after his death his friends produced such incontestible proof of the falseness of certain later charges made against him by Mexico's agents in "Mexico's Case," affecting his conduct as an officer in the Mexican war and the war of the rebellion, that counsel for the Mexican government felt constrained to withdraw them, with an expression of regret that they had ever been made.*

The falseness of this "newly discovered evidence" can readily be shown by comparing the statements in the different depositions as to the same fact.

J. F. Gamboa says in his deposition (*Record*, 292, near the foot of the page) that *Loaiza* "received $100 at the same time that deponent and his brother Trinidad received the $200 in Machado's Square." But Loaiza says in his deposition (*Record*, 295) that Adams promised "to defray his *traveling expenses* and pay him $180 *due him on his salary* (he had formerly been employed by the company) if he would go from San Ignacio to Mazatlan, and give his testimony before the United States consul there, but that although "deponent remained in Mazatlan, after that, eight or ten days, all they gave him for

* See appendix V to this argument for an extract from Mr. Lines' testimony in the Senate investigation.

his expenses was *sixty or seventy dollars*, and *they did not pay him what they owed him on his salary as promised.*"

Now, who was it that testified falsely in this matter—Loaiza or J. F. Gamboa? Trinidad Gamboa was not a witness for the Company before the Commission. It appears from these depositions of both the Gamboas that what they received from Adams was for their traveling expenses and services, although J. F. Gamboa says, doubtless for the purpose of suggesting his own subornation, "that he agreed to go to Mazatlan to testify in consideration of the compensation promised, and lost no time in coming to an agreement with Adams in that respect." It also appears that these witnesses were employed and examined on behalf of other claimants for whom Adams was acting as attorney in Mexico (*Record*, 189, answer to question 12), and that the question whether his relations and dealings with them were proper or not was in issue on the evidence before the Commission. (*Ib.*, 190, 191.)

Even if Gamboa's original testimony had been material or of weight in the estimation of the Umpire, the award could not be opened on his affidavit, for, as held by all the judges in *Pilmore v. Hood* (8 Scott, 180), a witness who had changed sides like that is not to be believed. In that case it was admittedly on the affiant's original testimony that the arbitrator had made his award, but in this case the original depositions of J. F. Gamboa, Loaiza, and Dahlgren, being largely hearsay, could be struck from the record without weakening the Company's case.*

* It is very significant that instead of re-examining the witnesses whose testimony justified the award—Chavarria, Galan, Clark, Green, Cole, Cryder, Mora—all residing in Mexico prior and subsequent to the Umpire's decision, or putting them on trial for perjury, or trying to impeach the genuineness of Mora's and Soto's orders of ejectment, the Mexican government should have made her appeal to the honor of the United States on such depositions as these, and *then have failed to produce the deponents in court.*

Another proof of the falsity of this "newly-discovered evidence" appears in Mr. Sisson's testimony in this suit. It was before him, as Commercial Agent for the United States at Mazatlan, that Loaiza's and J. F. Gamboa's original testimony for the Company was taken. In their later depositions these witnesses say that they were under the influence of liquor when they were sworn by Mr. Sisson.

Loaiza says he was—

> "a little intoxicated—a habit he used to indulge in at that time but from which he has been entirely cured for the last five years, as it is public and notorious in this village"—

and J. F. Gamboa says that—

> "He does not know whether the translation read to him by the court contains literally the words of the (original) deposition which he confesses to have signed, and of which he has not at present the least idea, *owing to the state of intoxication he was in when he signed it.*"

He also says that—

> "*The deposition* did not *then* seem to him false, because *he thought it had no authenticity if the state deponent was in was taken into consideration.*" (*Record*, 292).

That is, he reasoned while he was drunk that his deposition would be null and void on account of his drunkenness. He also says that while he was drunk he at first refused to sign the deposition, but that on account of the urgent entreaties of Messrs. Alonzo W. Adams, James

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But it is more surprising still that in the absence of judicial proof of perjury which, under the circumstances, Mexico was bound to furnish and the United States to exact, and in face of such contracts as the Mexican government made with Slaughter and Granger for the subversion of the award, the solemn covenants of the treaty, and the adjudicated rights of American citizens have been held for naught so long.

Granger, and Charles T. Galan, "he resolved at last to sign it."

In this suit Mr. Sisson was examined as to the truth of the certificate attached to each of the original depositions of these men—the originals (in Spanish) having been brought from the Department of State by one of its employees—and as to the condition of Gamboa and Loaiza when they were sworn. Mr. Sisson having testified to the truth of the certificate in each case, his examination was continued as follows (*Record*, 688, 689):

"Question. Now, I want to invite your attention to the eleventh paragraph of the bill of complaint of the United States in the case in which you are now testifying, and especially to the part that I will read: 'And the said Republic of Mexico in the month of June, 1877, procured from the said J. M. Loaiza an affidavit stating that the affidavit made by him in May, 1870, in support of said claim, was false, and that the same had been made when affiant was intoxicated and under the persuasion of said Adams.' Now, I want to ask you if there is any truth in the statement that Loaiza's deposition was made when he was intoxicated?

"Answer. No, sir; he was not intoxicated when he made that deposition in the consulate.

"Question. Did you ever, in all the course of your consular office, take the deposition of a man who was under the influence of liquor?

"Answer. No, sir.

"Question. [After reading from J. F. Gamboa's affidavit.] What have you to say in regard to the truth or falsity of that statement?

"Answer. I say he was not intoxicated when he was examined and signed that deposition.

"Question. What have you to say in regard to suggestions and repeated offers to him to sign it?

"Answer. No such thing in my presence or hearing.

"Question. Was the deposition signed and sworn to in your presence?

"Answer. Yes, sir.

"Question. Is it true it was read to him in Spanish, as he alleges here?

"Answer. Yes, sir."

The appellants are not content simply to have these perjured depositions thrown out of the case because of the failure of the Government to produce the deponents for cross-examination in this suit, but beg the court to consider what it really was that Mexico and her agents in this country undertook to do in respect to these original witnesses for the company—Gamboa, Loaiza, and Dahlgren—and why they finally drew back at the crisis.

What was the purpose of producing these affidavits and making the averments in the bill? It was to show what could and would be proved by the complainant in this suit. The Court of Claims, sitting, as it said, "in the exercise of equity powers," should have applied the rule in equity in this case. *

But if *all* the fraud charged in the bill does not need to be proved, and it would suffice if a material part of it is made out by that conclusive kind of proof required in such cases, nevertheless, when it appears that charges of such gravity are wantonly made—especially if the moving affidavits are themselves perjured or open to just suspicion, and the affiants are not even produced as promised at the trial—then all the complainant's other proofs should be regarded with suspicion and subjected to the strictest scrutiny of the court.

* In setting aside a lease for concealment and misrepresentation, *the very fraud alleged by the bill must be proved. Donegal* v. *Gray*, 13 Ir. Eq. R. 12, cited in CHITTY'S *Equity Index*, vol. III, 2624.

If the bill alleges a case of fraud, and the title to relief rests upon that fraud alone, the bill will be dismissed if the fraud *as alleged* is not proved. (KERR on *Fraud and Mistake*, Bump's ed., 383.)

The next promise of the Government to prove fraud by witnesses designated in the XVIth paragraph of the bill is this—

> "That Frederick Sundell, A. B. Elder, Ramon Hermosillo, Eugenio Somero, and Francisco Torres can and will testify that the material allegations of the said memorial, and the material testimony submitted by said defendant company in support of said claim are false." (*Record*, 16.)

But as to the first part of this citation, it may be said that it is not the material allegations in the Company's *memorial* that are in issue here. The only question submitted by the jurisdictional act to the court is—

> "Whether the *award* made by the * * * Commission, in respect to the claim of the said La Abra * * * Company *was obtained* as to the whole sum included therein, or as to any part thereof, by FRAUD *effectuated* by means of false swearing or other false and fraudulent practices on the part of the said La Abra * * * Company, or its agents, attorneys, or assigns."

This requires the court to ascertain what *evidence* it was on which the Umpire relied in making his award, and to determine whether *that evidence* consisted of "false swearing," and was obtained by false and fraudulent practices on the part of the Company, its agents, attorneys, or assigns. The Umpire did not rely upon the "memorial," but upon certain parts of the evidence in making his award. He did not accept the measure of damages set up in the memorial, and he did not allow one quarter of the amount which it claimed. The majority of the Court of Claims erred in the opinion that "the memorial before the Mixed Commission * * * is the foundation upon which this proceeding is based" (*Record*, 818), and that the Company is here "asserting the original averments of the memorial." (*Ib.*, 841.) The

memorial asserts that at the time of the abandonment of the mines "the Company were obliged to abandon 1,000 tons of silver ore already extracted, worth $500,000." The Umpire allowed only one-fifth of that amount, and the Company accepts that allowance as sufficient. The Company is certainly not asserting in this suit the original claim as presented to the Commission. It is here defending the Umpire's award. The memorial alleged that the mines, with the buildings and other permanent structures, were worth $1,000,000, and that if the Company had not been driven out it could have made that amount in clear annual profits. But the Umpire allowed only what the Company had actually spent, plus an allowance of $100,000 for the ore on the "patio," and the Company is concluded by the award. The Company does not here assert those original averments nor did they have weight with the Umpire. What the Company does assert is that the evidence which tended to fix on the Mexican authorities the responsibility for the Company's abandonment of its property is true, and that it was properly obtained. This, however, the Company does not need to prove, for the award imports verity, and the burden of proof is with the complainant.

The dissenting opinion criticises the manner in which the *memorial* was used by the Government in this suit. On this point the learned Chief Justice said (*Record*, 846):

> "The claimants before the International Commission set up a wildly exaggerated demand for $3,000,030, and their witnesses testified in much the same way; and on the argument before this court the case has been treated much as if the Umpire had allowed what these exaggerated statements called for.* *But such is not the award which is now*

* It will be seen, by a stipulation printed *infra*, p. —, what wonderful results have been obtained by tunnelling the Candelaria

the subject of consideration. The Umpire rejected all conjectural damages and reduced his award to the following five items" (*vide* the whole passage).

"The material allegations of the said memorial" and "the material testimony submitted by said defendant Company," which were to be proved false by Sundell, Elder, Hermosillo, Somero, and Torres, should have been designated in the bill. In view of the measure of damages adopted by the Umpire, could it be said that the alleged value of the mines or the income it was claimed they would have yielded, were "material allegations of the said memorial?" Was the testimony on these points—largely, of course, matter of opinion, on which honest men might differ—part of "the material testimony" submitted to the Commission? Be the meaning of the complainant's averment what it may, the fact is that neither Elder, Hermosillo, nor Somero was produced as a witness in this suit. The failure to produce Elder is especially significant, for he was employed by the Company as foreman at the mill from the latter part of De Lagnel's superintendency, in the spring of 1867, until December of that year—about three months prior to Exall's abandonment of the Company's property. An account of his examination in the Senate, printed in Appendix IV to this argument, will, it is believed, explain the failure of the complainant to produce him as a witness in this suit. One of the most infamous of the charges made by Mexico's agents against the Company was proved by this man—a witness for Mexico in the Senate examination—to be utterly false and without color or excuse.

The other two witnesses—Sundell and Torres—were

mines at San Dimas below the old workings. Two of the estimates of the value of La Abra Company's mines were expressly based upon their development in this way (*Record*, 47, 75), and all of the estimates may have had this in view.

examined orally in this suit by the complainant's counsel in San Francisco, and upon cross-interrogatories in writing, prepared for the Company in Washington. These two, then, are the only witnesses of the five mentioned in this specification who appeared to testify to what the Government had therein pledged itself to prove.

Before examining their testimony, it should be observed that a fact of great importance was established by Hermosillo and Somero in the Senate investigation—two of the witnesses whom the complainant has failed to produce in this suit—viz., that, after the abandonment of its property by the Company, a tunnel was commenced to reach the veins under the old workings of La Abra mine by Ignacio Manjarres, one of the most experienced miners in Mexico, and that he continued the work "perhaps ten years," and was still at it when he died, after having spent some $60,000 or $70,000 on the undertaking. (Report No. 2705, Sen., 50th Cong., 2d Sess., 532–546.) This proof that one of the best judges of such property in Mexico was so firmly convinced of the undeveloped resources of this particular mine was not known to the Commission, for, although this same Manjarres was examined as a witness for the Mexican government while the Commission was in session, it was not until long after the award was rendered that he commenced to tunnel La Abra. It also appeared from Somero's testimony in the Senate investigation that he himself was one of several Mexicans who "denounced" and worked the Company's mines after Exall's departure, thus contradicting the idea so industriously promoted by Mexico's agents that these mines were not thought to be valuable by the magistrates or people of the vicinage. The idea that the Company's mines were rich, and that Mexicans—not "Gringos"—should own these Mexican mines was undoubtedly prevalent.

Returning now to Sundell and Torres, who, according to the bill, were to prove the falseness of the Company's claim, it has already been observed that, according to equity practice, their testimony was not admissible in support of such a vague and general allegation. But the Company's demurrer—one of the grounds of which was that fraud had not been properly pleaded—having been overruled, and these witnesses having been examined, some attention may now be given to their testimony.

Testimony of Frederick Sundell.

From 1865 to 1868, inclusive, Sundell was employed as assayer by the Durango Company at San Dimas while La Abra Company was in operation at Tayoltita, about 15 miles distant. With the exception of the time from January, '69 to October, '71, he remained at San Dimas until 1877, when on August 9th of that year he was examined *ex parte*, at Mazatlan, and his deposition makes part of the so-called "newly-discovered evidence" comprised in Exhibit B of the bill. (*Record*, 296–303.) There are two versions of this deposition—one consisting of oral answers to interrogatories in Spanish, of which there is a "translation," (*ib.*, 296–300), and the other consisting of answers written in English by the deponent. (*Ib.*, 301–303.) This duplication is explained as follows (*ib.*, 300):

> "He also stated that for the better understanding of the facts related in this deposition, they presented him a translation into English of the interrogatory of the district attorney [Gaona], and deponent wrote an answer to each one of the points contained therein, which he signed with his own hand, and can be appended to these documents, as he has gone more into details."

These papers were put into his hands at his examination in this suit (October 2, 1894), and he was examined as to their contents, and gave substantially the same explanation of their duplication. (*Record*, 517, 518.) In this examination he corrected two alleged errors in those depositions, one of which was that he "was at Mazatlan from 1865 to the end of 1868," whereas in fact he had "lived in San Dimas without interruption the whole time in the years referred to." (*Record*, 518.) The other correction was to the effect that instead of stating he had never visited the mines or works of La Abra Company, he stated that he had "*never visited the mines or the workings in the mines.*" (*Record*, 518, Ans. to Q. 20.)

He was then asked—

> "Are those all the errors that you have discovered in the translation as it appears in the exhibits to the bill?"

To which he answered:

> "Yes, sir, that is all.
>
> "Q. 22. With those exceptions, then, the document appearing on pages 332 to 340 in the exhibits to the bill, embodies a correct translation of the deposition given by you in the month of August, 1877?
>
> "A. Yes, sir." (*Record*, 518.)

It was under *Granger's* auspices, and after consultation with him, that Sundell was examined at Mazatlan in 1877. (*Record*, 545, answers to cross-questions 49 and 50.) Meanwhile (and shortly afterwards), Granger had made his contract with the Mexican government as set forth in District Attorney Gaona's testimony (*Record*, 571, 572), and it had become important for the Mexican government and its agents here to convey the impression that Granger remained at Tayoltita *as superintendent for the Company*, after Exall's departure, and

not as son-in-law and confederate of the local magistrate, Soto. It was Sundell who had translated "Exall's autograph" of February 26, 1868, into Spanish for Granger's use, and which (although it was used in and out of court at San Dimas before and during the session of the Commission), has been relied upon since 1878 to show that Granger was the *Company's* superintendent, and that his possession or control of the Company's property at Tayoltita after Exall left, was the Company's possession or control, and that such possession or control continued at least to August 12, 1868, the date of Granger's letter to the collector of taxes. This theory—which is really the gist of Mexico's case—is more particularly discussed elsewhere, but sufficient has now been said to show the importance of the question, whether Granger was regarded as the Company's superintendent after Exall left; that is, in charge of the Company's property and business, by its appointment, or at all events, with its knowledge and consent. The subject of Granger's relations to Exall and to the Company was brought directly to Sundell's attention in his examination at Mazatlan by the 28th interrogatory, in which he was requested—

> "To state * * * whether he recognizes as his the enclosed translation, which will be shown to him, and whether he remembers precisely that he made said translation faithfully from the original signed by Charles H. Exall. (*Record*, 297, foot of the page.)

To which he replied (*Record*, 300):

> "As regards the 28th point, he says that he acknowledges as his the translation referred to, made from the original, about which the court of the first instance of San Dimas took some legal steps."

In this same examination he was asked—question 4th—(*Record*, 296):

> * * * "Whether *he knew and was intimate with the administrators or superintendents of La Abra Company* or the other employees; and if so, *to state their names.*"

To this he replied (*Record*, 298):

> "Was on friendly terms with Julian A. De Lagnel, who acted for some time as the superintendent of said Company. He also knew and became acquainted with Charles H. Exall, who succeeded De Lagnel when he left; *he did not know any other superintendents.*"

The answer that he wrote in English to this same question (*supra*) is given as follows (*Record*, 302):

> "Fourth. He said that he has visited Tayoltita several times, and became acquainted with Julian A. De Lagnel and Charles H. Exall, superintendents of La Abra Company. He does not —— Thomas T. Bartholow."

Bartholow was the first superintendent, whom, as appears elsewhere, Sundell never met. De Lagnel was the second superintendent, and Exall the third and last.

There can be no reasonable doubt, in view of this deliberate and repeated exclusion of Granger from the list of the Company's superintendents, that he was not regarded at that time by Sundell as having been employed or authorized by the Company to act in that capacity. The two men had been intimate for ten years, and were together and in consultation at Mazatlan when Sundell was examined. But Sundell had actual knowledge that Granger was neither superintendent of the Company, nor possessed of any authority from its officers to act for it or

them in any capacity or respect whatever, for when in 1873—*five years after Exall's departure*—Granger desired to dispose of some remnants of the Company's property, he got Sundell to make another translation of Exall's letter of February 26, 1868, this time in court at San Dimas, because he had nothing else that would answer his purpose—not a letter or scrap of writing from the Company, or any of its officers in all that time.

But when, seventeen years later, Sundell was examined in this suit, he included *Granger* among the Company's superintendents (*Record*, 520):

> "61. Question. Did you know, during your stay at San Dimas, from 1865 to 1868, the officers of La Abra Mining Company at Tayoltita?
>
> Answer. Yes; except the first superintendent.
>
> 62. Question. What was his name?
>
> Answer. I think, Bartholow.
>
> 63. Question. Who were the other superintendents with whom you were acquainted?
>
> Answer. Julian A. de Lagnel, Charles Exall, and *James Granger*.
>
> 64. Question. In what order were they superintendents?
>
> Answer. In that order named."

When asked on cross-examination why he did not mention Granger as one of the Company's superintendents in the Mazatlan examination (*Record*, 534, cross-ques. 6), he said (*ib.*, 541, 542):

> "When I gave my testimony in August, 1877, the district judge, Rafael Villegas, intimated that testimony was required that had a bearing on the events complained of by La Abra Company, and to the time said events had taken place. As Mr. Granger's advent as a 'in charge of' or 'superintendent of La Abra Company's property' was a *subsequent* event, I could not mention him as one of them. At the pres-

> ent time, *when subsequent events are inquired into*, I feel obliged to mention Mr. Granger, as his doings seem to be of much importance."

In making his explanation he seems to have forgotten that he was examined on written interrogatories at Mazatlan, and that one set of his answers was written out by himself in English; also that there was no limit of time in the question or in either of his answers, at Mazatlan, in regard to the Company's superintendents. He was asked whether he knew them, and, if so, *to state their names*, which he did, adding, of his own accord, that "he did not know *any other* superintendents."

There is neither proof nor likelihood that the judge intervened with any such suggestion as Sundell states. Nor is it true that his examination at Mazatlan was confined to events prior to Exall's departure. The translation of Exall's letter of February 26, 1868, made in court at San Dimas by Sundell, as to which he was examined at Mazatlan, was made more than five years after "the events complained of by La Abra Company." He was also examined at Mazatlan as to the testimony given by Exall and Bartholow before the Mixed Commission in 1870 and 1874 (*Record*, 297, ques. 20), and, after reading their depositions, he gave his opinion on the points specified in the question. (*Ib.*, 299.) He was also examined *as to the treatment accorded to Granger himself subsequent to Exall's departure* (*Record*, 297, ques. 26th), and he answered (*ib.*, 300)—

> "That the only foreigners that remained in the mines *after Exall left* were Messrs. Granger and Sloan, and deponent never heard that they were ever molested in their persons or property."

In the light of his own testimony, Sundell's explanation of this significant discrepancy between what he said

at Mazatlan and what he said in this suit, as to Granger's relation to the Company, is seen to be a tissue of falsehoods.

The truth is, that he was examined at Mazatlan for the purpose of subverting the award, and if it had occurred to Gaona and Granger, who were acting for Mexico at that time, as it subsequently did to Mexico's agents in Washington, that it might be claimed that the Company was represented by a superintendent at Tayoltita, in the person of Granger after Exall's departure, and could not therefore have abandoned its enterprise or its property when Exall left, Sundell would have included Granger among the Company's superintendents in his Mazatlan depositions, as he did seventeen years later in this suit.

He also swore in this suit, as he had done at Mazatlan, although given a fair opportunity to correct his mistake, that Mr. Rice, superintendent of the Durango Company at San Dimas, left Mexico in January, 1868. (*Record*, 521.) But it is clear from the evidence that Mr. Rice did not leave San Dimas till April or May. He bought some bullion from Granger after Exall left, and we know that Exall was in Mazatlan on March 15, 1868, for that is the date of a letter which he wrote to Granger at that place after leaving the mines. (*Record*, 286.) The following from Francisco Torres' testimony shows that Mr. Rice was at San Dimas after Exall had gone (*Record*, 551):

> "* * * I recollect that on one occasion Mr. Rice was offered a small bar of silver.
>
> "66. Q. By whom?—A. Said to belong to the Company. It was taken by a party there for the purpose of selling it.
>
> "67. Q. Who was the party?—A. It was taken by Don Santiago Granger.
>
> "68. Was that before or after El Mudo (Exall) had left?—A. *It was after El Mudo left.* (*Record*, 551).

The testimony of Mr. Rice's brother-in-law, Mr. Birmingham, is conclusive on that point. (*Record*, 741).

And there are debits and credits to J. G. Rice in one of the Company's old books, dated April 14 and 30, 1868. (*Record*, 750.)

The time of Mr. Rice's departure from San Dimas has an important bearing on the credibility of Sundell's testimony, for in order to show that Exall had spoken publicly about leaving Tayoltita, and returning to New York months before he left (although, of course, that would not prove that he was not finally compelled to leave for fear of his life), Sundell had made the following statement in his deposition at Mazatlan in August, 1877. (*Record*, 303):

> "Mr. Reed * (Rice) superintendent of the Durango Mining Company, *left Durango in January of 1868*, and deponent remembers that Mr. Exall *came to Mr. Reed's* (Mr. Rice's) *and told him how sorry he was not to accompany him in his trip, but he was in hopes of following him in the next steamer*, as he had to go to New York to consult with the Company; Exall said this in public, and did not make a secret of his intended trip."

Although in this suit he reiterated his statement that Mr. Rice left Mexico in January, 1868, adding that he went from San Dimas "on horseback to Mazatlan, and by steamer from Mazatlan to San Francisco," Sundell's recollection of Exall's farewell visit and parting words to Rice seems to have failed him (*Record*, 521):

> "76. Q. Do you remember seeing Mr. Exall, the superintendent of La Abra Mining Company, at San Dimas *about the time that Mr. Rice left?—A. No; not particularly.*
>
> "77. Q. Did you not say in your deposition in

* Corrected by the witness at his examination in this suit. (*Record*, 521.)

1877 that you remembered having seen Mr. Exall *at that time?*—A. I remembered it at the time I gave my deposition, but, *of course, I do not remember* now.*

"78. Q. Did you or not then say so?—A. Yes, sir (here he must have looked at his deposition); I said so in answer to the twenty-third point."

Now, keeping in mind that the point of the alleged farewell remarks of Exall to Rice was that Exall had spoken publicly of his intended departure months before he left, what follows is especially significant:

"79. Q. Do you remember, Mr. Sundell, Mr. Exall *at any time* about the month of January, 1868, *speaking* of an intention to leave La Abra Company's mines to consult with the Company?—A. (Now notice how he dodges the question.) I *knew that he was going*, there was no secrecy about it, but any particular day I do not remember." (*Record*, 521.)

The question was whether he remembered Exall "*speaking.*"

What had become of Exall's parting words—of the wish that he was going with Rice—of the hope of following him by the next steamer? Had it dawned upon Sundell, in the interval, that Exall left first and that perhaps the fact might be proved in this suit, and his Mazatlan deposition and his credibility as a witness be irreparably damaged? The examiner was evidently in blissful ignorance of the fact that Exall left first and that Rice bade him good-by at Mazatlan, and took back a letter from him to Granger at the mines. This appears from Exall's letter of March 15, 1868, to Granger. (*Record*, 286.)

* Compare this failure of memory with the circumstantial explanation which he made in this suit touching his exclusion of Granger as one of the Company's superintendents in the Mazatlan depositions.

Sundell knew he was on dangerous ground while testifying in this suit, on that subject, and he squirmed like an eel in the hands of complainant's counsel:

> "85. Q. Did you visit Tayoltita *after* Mr. Rice left San Dimas and *before* Mr. Exall left Tayoltita?—A. I think not.
>
> "86. Q. Did you see Mr. Exall at San Dimas, or elsewhere, *after* Mr. Rice left San Dimas?—A. Well, I think I saw him once.
>
> "87. Q. Did you have any conversation with Mr. Exall about his leaving Tayoltita?—A. Well, in a general way.
>
> "88. Q. Was there any particular circumstance *assigned by Mr. Exall* in that conversation as a reason for his leaving Tayoltita, or any condition of affairs at Tayoltita?—A. Well, *the reason why he left* was because the mine did not pay and he had nothing to do. The mine did not pay to work, and the Company would not furnish him any more money.
>
> "89. Q. Was that the reason *assigned by him?*—A. It was *the general understanding.* (*Record*, 522.)

Again the questions were *what Exall had said*, but the witness who, at Mazatlan, had given Exall's words to Rice, when the latter was represented as leaving for New York, had to fall back on "the general understanding"—the general understanding in regard to something, be it observed, which had not then happened.

When Sundell's attention was drawn on cross-examination to Exall's letter of March 15, 1868, in which he says to Granger, "I wrote you by Rice," and he was asked to state if he knew who was that Mr. Rice, he said:

> "There was a *Mexican* nicknamed 'José Rice' or 'Mister Rice' who was employed by the *Americans* as a messenger and as a servant on the road to and from Mazatlan or Durango. If the man is still living at San Dimas, he can be found by those

names, as the people have forgotten his true name." (*Record*, 542, answer to cross-question 15.)

Now, there is no reference in the whole of the case to any Mexican nicknamed Rice, or to any person of that name other than Mr. Joseph Rice, superintendent of the Durango Company at San Dimas, except Seth Rice, one of the Company's American machinists, who returned during De Lagnel's superintendency. (*Record*, 238.)

It is clear that Mr. Rice remained at San Dimas after Exall left Tayoltita, and was one of the American friends who accompanied him to Mazatlan. It is also clear that Exall was at San Dimas on the 12th of January, 1868, as appears from his letter of that date, written at that place, to Señor Larenga. (*Record*, 279, 280.) And as he had just been released from the pest house, he was probably homesick about that time, and may have said to Sundell or Rice that he would like to leave the country by the next steamer. Rice had expected to leave by the same steamer that Exall subsequently took, but remained later, as explained by Mr. Birmingham in his testimony (*Record*, 741):

> "He (Rice) had resigned his superintendency in 1867, but for certain reasons remained over when Mr. Martin was appointed his successor until 1868, when he wrote that he would *expect to arrive in San Francisco in the latter part of March*, but was detained until later."

Another proof of Sundell's untrustworthiness as a witness is furnished by his testimony in regard to the bullion which he refined for De Lagnel shortly prior to the close of the latter's superintendency and his departure from Tayoltita (*Record*, 523):

> "105. Q. About how much was there of it?—A. He brought about 13 pounds of bullion.

"106. Q. What was its condition?—A. A very low alloy.

"107. Q. About what proportion of pure silver was there in this 13 pounds?—A. About two-thirds.

"108. Q. What was the rest?—A. Copper and iron.

"109. Q. What, if anything, did you do with this bullion?—A. I refined it for him.

"110. Q. And what was the result of your refining?—A. *Nine pounds of pure silver.*

"111. Q. Do you know what became of that bullion after you refined it?—A. Mr. De Lagnel reported that he was going to take it home to his company."

On cross-examination in regard to the weight and value of the refined bullion, he said he meant "9 pounds Mexican weight," and that "the Mexican mint price for silver at that time was $9 a marc, which is equal to $18 a pound." (*Record*, 543.) This would make the refined bullion worth $162. But we know positively that it was worth double that or more. It was taken from De Lagnel (who was trying to smuggle it out of the country) by the Custom House officers at Mazatlan, and it was afterwards redeemed by Exall who sent it to Mr. Garth in New York, and reported the transaction to him on the 17th of May, 1867, as follows (*Record*, 266):

"I succeeded in recovering the bullion which the authorities here took from Col. De L., by the payment to the different government officers and getting it aboard steamer of the sum of $247. I had either to pay the amount mentioned, or allow them to retain the silver, *its value being much more*—there being a large percentage of *gold* in it."

Mr. Garth said in his testimony in this suit that he thought the "little piece of bullion that came from there brought $300." (*Record*, 717.) His recollection when

he testified before the Senate subcommittee was as follows:

> "I think there was a piece of silver that came to New York sent by Exall or De Lagnel—Exall, I think—which sold for three hundred and odd dollars—$380 or $390, I think, as near as I can recollect." (Rep. No. 2705, Sen., 50th Cong., 2d Sess., 114.)

And he added that it was mixed with gold.

It thus appears that Sundell in his usual positive manner misstated the composition and value of the bullion which he had himself refined, and that, therefore, even in a matter within his personal and professional knowledge, his testimony is unworthy of credit. The fact that he testified on this matter from memory—as he stated in his cross-examination (*Record*, 543)—increases rather than lessens his untrustworthiness; for he should not have been willing to testify so positively in his direct examination about a matter of such detail after a lapse of twenty-seven years. One would have thought that he was reading from a memorandum made at the time.

When questioned about the remains of the ore that was piled at the Company's hacienda, he said that when he was there in 1890, *it had all been thrown into the river.* (*Record*, 525.)

But Francisco Torres, whose testimony was taken for the Complainant, in this suit, in October, 1894, testified that he was there "in May last," that he "saw the ores," and that they "*still exist there.*" (*Record*, 550, answer to question 42.)

In answer to cross-question 29, Sundell said that Ralph Martin "arrived at San Dimas about October, 1867." (*Record*, 543.) But Martin succeeded Rice as superintendent of the Durango Company, and arrived at San

Dimas after La Abra Company had abandoned its property at Tayoltita. (*Record*, 161, 164.)

In answer to cross-questions 31 and 32, regarding the nature of the ores at the Company's hacienda and in the district generally, Sundell said (*Record*, 543):

> "My general knowledge of the ores in that district entitles me to call them free milling ores and not rebellious ores. * * * Colonel De Lagnel's description may be accepted as substantially correct, but the presence of 'shining yellow pyrites' does not make the ores in that district rebellious."

A. B. Elder, who had mined for himself at La Puerta; near Tayoltita, and was afterwards in charge of La Abra Company's reduction works, testified, on that point, as a witness for the Mexican government in the Senate investigation, as follows:

> "Q. You said you owned a mine at La Puerta; what kind of a mine was that?
>
> "A. It was a gold and silver mine.
>
> "Q. What was the character of the ore?
>
> "A. It was sulphuret *and very refractory.* (Rep. No. 2705, Sen., 50th Cong., 2d Sess., 567.)
>
> "Q. What was the character of the ore that was left—the 75 per cent. remaining on the patio (of La Abra Company's hacienda)?
>
> "A. That was a sulphuret ore, colored, and containing a great deal of antimony and some lead, as well as some iron in the shape of iron pyrites which made it *a very refractory ore.* (*Ib.*, 559.)
>
> "Q. And how many tons of La Luz ore of this rebellious or refractory kind were on the patio?
>
> "A. I think there were some 500 tons of those ores." (*Ib.*, 589, 590.)

The Mexican agent, Avila, in his motion before the Umpire for a rehearing, offered to prove in mitigation of damages (after the case had been pending more than five years, and had been finally decided under the

treaty), that much of the ore in the Company's pile was rebellious, and, in token of his ability to prove the refractory character of the ore, he referred to certain data which he had obtained from the Messrs. Barcena, of Philadelphia. (Ex. Doc., No. 103, H. R., 48th Cong., 1st Sess., 122.)

Thus the Mexican agent made an offer, twenty-two years ago, to prove the very thing which Sundell, as a witness for Mexico and the United States in this suit, now deliberately and specifically denies, although it is proved by a mass of concurrent testimony.

In denying Avila's motion for a rehearing, the Umpire inquired:

> "Why were not the statements of these gentlemen—of whose existence the Umpire was not aware, and to whom he had not access—reduced to evidence and produced before the Commission?" (*Ib.*, 127.)

Sundell also said, in answer to cross-question 32 (*Record*, 543), "that the ores in the district of San Dimas do not change, although they may be exposed to the atmosphere for a number of years;" while Elder testified before the Senate subcommittee, as a witness for Mexico, that exposure would in time desulphurize them, and they would in time decompose. (Rep. No. 2705, Sen., 50th Cong., 2d Sess., 590.)

How can fraud or anything else be proved by witnesses who, although called on the same side, contradict themselves and each other so flatly?

In answer to questions 279 and 280, in his examination in this suit (*Record*, 533), evidently put to him for the purpose of showing that he had not made himself familiar with La Abra Company's case, Sundell said that he had *never seen a copy* of "the testimony given for and against the claim of La Abra Company before the Mixed

Commission of the United States and Mexico" *until the year 1888.* (*Record*, 533.) But in his examination at Mazatlan, in 1877, he was asked (*Record*, 297, question 20th)—

> "To state, after reading the affidavits of Bartholow and Exall, *contained in the book of evidence in support of the claim of La Abra Company* * * * whether," etc.

And in reply he said (*Record*, 299)—

> "That *he had read carefully* the depositions of Bartholow and Exall, to be seen in *the book of evidence* in support of the claim of La Abra Company, as also the depositions about Juan Nepomuceno Manjarres, Bartolo Rodrigues, and Camacho."

The Government undertook, in this XVIth paragraph, to prove by Sundell that the material allegations of the Company's memorial and the material testimony which it submitted in support of its claim were false. Exall's imprisonment, which is certainly a material part of the Company's case, is alleged in the memorial, and is the subject of much of the evidence on both sides. We will now examine Sundell's testimony on this material part of the Company's case. And, first, it is to be observed that he had no personal knowledge of the imprisonment, and that his testimony on the subject consists entirely of what he says that Exall told him about it. He was not questioned, and he did not say anything on this subject in his examination at Mazatlan, but as he read Exall's depositions at that time (*supra*) which referred to his imprisonment, and as Granger, with whom he was in consultation, knew that this was an important part of the Company's case, and had himself testified on the subject, it may be safely assumed that if Sundell had recollected Exall's alleged statement in 1877, ten years after it was made, he would not now be testifying to it for the first

time in this suit, sixteen years later. The alleged statement was made to him in January, 1868, and he testified to it for the first time in October, 1894, after a lapse of twenty-six years.

The following is from Sundell's direct examination in this suit (*Record*, 527):

> "179. Q. Did you know Judge Nicanor Perez at Tayoltita?—A. Yes, I knew him.
>
> "180. Q. Did you ever hear of any trouble between him and Mr. Exall in the latter part of 1867 or the first part of 1868?—A. Yes, sir. *Exall told me about it.*
>
> "181. Q. Well, what did Exall tell you about it?—A. Exall *came over to San Dimas* and told me he had some trouble with Nicanor Perez, because Nicanor Perez *wanted to go into the storeroom where Exall was*, and Exall got him out of the storeroom, and Nicanor Perez got offended. *If I remember right*, he arrested Exall for a few hours.
>
> "182. Q. How soon after this occurrence was it that Exall told you about it?—A. *The next day Exall got out.*
>
> "183. Q. Was Exall imprisoned after he told you about his short imprisonment?—A. No, sir; he never was.
>
> "184. Q. Do you know whether he took any steps to complain to the higher authorities of Nicanor Perez's action?—A. I do not.
>
> "185. Q. Was Mr. Rice still at San Dimas at this time?—A. I do not remember.
>
> "186. Q. Did you ever hear of any further trouble between Exall and Judge Perez?—A. Never."

The following is from his cross-examination, which was conducted by the United States Commissioner in San Francisco upon written interrogatories prepared in Washington:

> "37. Cross-question. You were asked in your direct examination (question 181) what Exall told you

about the trouble he had with Judge Nicanor Perez, and you said that, if you remembered right, Judge Perez 'arrested Exall for a few hours.' Do you swear that Exall told you that he was arrested or imprisoned by Judge Perez only for a few hours?" (*Record*, 537.)

To this he replied:

"Answer to cross-question 37. I swear that to the best of my knowledge, recollection, and belief that Exall told me that he was *arrested* by Judge Perez only for a few hours." (*Record*, 544.)

Instead of testifying in his usual positive, unqualified manner, Sundell said in his direct examination (*supra*), referring to Perez: "*If I remember right*, he *arrested* Exall for a few hours." But Sundell had no personal knowledge of the occurrence, and was telling—as he said—what Exall had told him about it. Sundell, so testifying, says that "*Perez wanted to go into the storeroom where Exall was.*" Exall says in his letter of January 7, 1868, to the Prefect, giving an account of the occurrence on the same day (*Record*, 280):

"This morning about 11 o'c'k, Sr. D. Gicanor Perez came into the store belonging to the hacienda, looked around, saluted us, and then *walked into the storeroom adjoining the store, the time I was behind the counter*, and seeing him in there, where no one was ever allowed without permission, I, in as polite Spanish as I was master of, requested him to *come out*," *etc.*

They were evidently in different rooms, and Perez did not go into the storeroom "*where Exall was.*" This is one of Sundell's mistakes, and is mentioned, not because it is important in itself, but to show that his recollection is not trustworthy, even when there may be no intention on his part to misrepresent or color a particular fact.

Curiously enough, the length of Exall's imprisonment in the pest-house can be shown from Sundell's statement

in connection with the letter-press copy-book. Sundell testified (*supra*) that Exall *came over to San Dimas* and told him of the occurrence, "*the next day Exall got out.*" It appears from Exall's letter of January 12th, 1868, written at San Dimas to Miguel Larenga, that he (Exall) had received *at Tayoltita* a letter, dated *the day before*, from Larenga, but had not answered it then and there, because he "intended to come here;" *i. e.*, to San Dimas, the next day, and so, he says, "I have deferred my answer till my arrival." He therefore "got out" on January 11th, 1868. Perez arrested him and he appealed to the Prefect at San Dimas by letter on January 7th. The Prefect (Olvera) did not interfere, and Perez shut him up in the pest-house on the 8th, and kept him there till the 11th. This agrees with the fact, as found by the Mexican Commissioner (Zamacona), and stated in his opinion on the Company's claim, that Exall's imprisonment lasted four days. (Ex. Doc. No. 103, H. R., 48th Cong., 1st Sess., 40.) Avila, the Mexican agent, a year or so later, contended, in his motion for a rehearing, that Exall's imprisonment "had a *cause* and lasted only a short time—two or three days" (*ib.*, 107). But Sundell tried to shorten the imprisonment, or rather the *arrest*, to "a few hours;" for he carefully avoided using the word "imprisonment" both in his direct and cross-examination; but unconsciously he furnished a clue to the length of time that Exall was confined in the pest-house by stating (as we have seen) that he came over to San Dimas *the day after he got out.*

At the close of his direct examination in this suit, Sundell was recalled, and question 288 was put to him (*Record*, 533):

> "When you testified on Tuesday last about Exall's trouble with and arrest by Judge Nicanor Perez, were you testifying solely from your present

recollection of that circumstance, *or had you ever seen or been told anything since the occurrence to refresh your memory about it?*"

And he answered:

"I only testified from my present memory of the occurrence."

But Sundell never knew anything of Exall's "trouble with and arrest by Judge Nicanor Perez," except by hearsay, and could not possibly have any recollection of "the occurrence" itself, but only of what he had heard about it after it happened—over a quarter of a century previously; and, in the second place, he testified at Mazatlan (*supra*) that "he had *carefully read the depositions of Bartholow and Exall contained in the book of evidence in support of the claim of La Abra Company*," and we know that there were references in both of Exall's depositions to his arrest and imprisonment at Tayoltita, and that *one of the objects of Sundell's examination was to throw discredit upon Exall's testimony and that of other witnesses as to the duration and horrible circumstances of his imprisonment.*

It was Granger that offered Sundell as a witness (through Gaona) to the Mexican government, and all three were together in conference at Mazatlan, as appears from Sundell's answers to cross-questions 49 and 50 (*Record*, 545):

"As far as I can recollect, I saw Granger at Mazatlan during my stay there of about a week, and we were staying at the same hotel, and probably saw him every day. I did have a conversation with Granger on the subject of my deposition of August 9, 1877, prior to making it, because he communicated to me verbally the request of the district attorney, L. Gaona, to have me examined in regard to the claim."

As a witness for the Mexican government at Mazatlan, and afterwards in this suit, Sundell, who lived at San Dimas, while the Company was at work in Tayoltita, had the most wonderful knowledge of everything that might, could, would or should have happened at Tayoltita in any way affecting the Company's claim.

In his deposition at Mazatlan, in answer to question 15th, he said—

> "That he never heard of the robbery spoken of, *neither could it have taken place without coming to his notice*, as deponent's habitual residence was only two hours' ride from La Abra mines in the San Dimas district." (*Record*, 299.)

He said in his examination in this suit that he had never visited the Company's mines (*Record*, 518) or assayed any of the Company's ores (*ib.*, 524), and that he could not tell the value of ores from looking at them (*ib.*, 524), and yet he said that the ores which the Company had at its hacienda would not pay either to beneficiate or mine! (*Ib.*, 524.)

On his direct examination, Sundell said he had never heard of *any* trouble between Exall and the Prefect, Mora or Olvera, and that it was *impossible* there could have been any serious trouble between them without his hearing of it. (*Record*, 525, answers to questions 147–150.) But, in answer to cross-question 33, he admitted that he *had* heard of the orders from Mora and the so-called "rising of the people." He added (*Record*, 544), in explanation, that he did "not consider the same as serious," but, of course, that did not explain why he had sworn on his direct examination that he had never heard of *any* trouble between Exall and those authorities.

Does it not seem absurd for Mexico or the United States to put this man's conjecture, in a matter so material to the Company's case, in the scales against the posi-

tive testimony of the Mexican magistrate, Soto, who swore, as a witness for Mexico, that he issued the orders in question "because there had been a rising of the people *to compel him to*," and "that, besides the disturbance on the part of the people, he had received orders to that effect from the political chief, Marcos Mora?" (*Record*, 129.)

And this is the best the government can do to make the proof which it undertook to make in the bill.

Another illustration of Sundell's habit of stating positively what he merely fancied or supposed (Record, 526):

> "165. Q. Do you know whether La Abra Company owned any mules of its own?—A. No, sir; they *never owned any pack mules.*
>
> "36. Cross-question. In answer to question 165 in your direct examination you said that La Abra Company never owned any pack mules. On what grounds do you make such a positive statement, when you have testified that you did not even know General Bartholow, the Company's first superintendent? Did you not mean simply to say that you never knew or heard of La Abra Company owning any pack mules?" (*Record*, 537.)
>
> "Answer to cross-question 36. I can say that I positively *heard* from George Grassie, who was on the road to get up the freight for the *Durango* Mining Company, and who was very well acquainted with Mr. Grove and Dr. Hardy, who were on the road for La Abra Company on the same business, that La Abra Company never was the *actual* owner of a *train* of pack mules. Sometimes a *nominal transfer* was resorted to to *prevent interference of the military authorities.*" (*Record*, 544.)

Sundell says he heard these things from Grassie, who was in the employ of the Durango Company, but does not even say that Grassie said that Grove and Hardy had so

informed him. That he had no personal knowledge on this subject appears from the following:

> "166. Q. About how many mules did they own, if any?—A. I *do not know*, but I should *think* from eight to ten *riding* mules used by the superintendent and the other employés." (*Record*, 526.)

Compare this with the testimony of one of the most prominent witnesses for Mexico (Ygnacio Manjarres) on the same point (*Record*, 121):

> "That the deponent never saw but *twenty-odd mules*, and these were *pack* and saddle mules."

The complainant tries to show by Sundell that Granger was in possession or control of the Company's property, as its agent or superintendent, as late as September, 1873 (*Record*, 531):

> "248. Question. At the time you made this translation in accordance with the application of Granger to the judge and the judge's summons to you, was there anybody, to your knowledge, other than Granger, claiming possession or control of La Abra Company's mines and property at Tayoltita?
> "Answer. Not to my knowledge."

But, more than two years earlier, Granger, who was in partnership with the Mexican miner, Torres, had denounced one of the Company's mines for himself, and in his own name, which he could not have done under the Mexican mining laws if he had been in the Company's employ or connected with it in any fiduciary capacity at that time.* As to that transaction, Sundell

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* The ordinance in force on that subject in Mexico at that time provided:

> "Neither shall Administrators, Stewards, Overseers, Keepers of Tallies, Workers or Watchers of Mines, nor, in general, *any person in the service of Mine Owners*, whether of superior or subordinate class, be permitted to register, denounce, or in

said, in answer to cross-question 3 (*Record*, 541):

> "I never had anything to do with the denouncement of El Rosario mine by James Granger, and if I did know anything about the denouncement at the time, or subsequently, *I have forgotten about it.*"

Granger's denouncement of El Rosario was a matter of record, and could have been made only upon proof *that the mine had been abandoned by the Company for a period not less than four months prior to the application.* And if there had been any suspicion on the part of the mining board that the applicant was an agent or in the employ of the former owner, he would have been compelled to prove that it was not so, or his application would have been rejected. He denounced the mine at San Dimas April 8, 1871, and he and his new Mexican partner, Francisco Torres, were put in possession of it by the mining board August 11, 1871.* And within two

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any other manner acquire mines within a space of a thousand yards round those of their masters, but I allow them to denounce any mine for their said master even though not authorized by them to do so, provided the aforesaid masters make good the denouncement in the terms prescribed by Section VIII of Chapter VI of these Ordinances." (ROCKWELL'S *Spanish and Mexican Law of Mines and Mining*, Chap. VII, Sec. IV, 56.)

This is the standard authority on the subject, and is referred to by Colonel De Lagnel in one of his letters from Tayoltita to the Treasurer of the Company in New York. (*Record*, 239, near the foot of the page.)

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*The following certificate from the official translator of the Commission is printed in the *Record* at the foot of page 28:

> "The copy of the papers contained in this denouncement, now on file before this Commission, show: That James Granger, an English subject, denounced the 'Rosario mine,' *formerly belonging* to La Abra Company at Tayoltita. The denouncement was dated at San Dimas, April 8, 1871. The usual formalities prescribed by the mining ordinances having been completed, formal possession of the mine was given to the said James Granger and *Francisco Torres, his partner*, by the 'Deputacion de Mineria' mining board on the 11th of August, 1871. The papers show that there was no opposition made to either the denouncement or possession."

weeks (August 23, 1871) he gave his first deposition as a witness for the Mexican government. (*Record*, 111.)

Now, it is a fact (although it may scarcely seem credible) that Sundell when he testified as quoted above, knew, of his own personal knowledge, that Francisco Torres was not only working one of the Company's mines, but living in the Company's hacienda at Tayoltita in the fall of 1871. (*Record*, 546, answer to cross-question 72):

> "On my return to San Dimas, in 1871, I passed through Tayoltia, *and did see Francisco Torres living in a room at La Abra Company's hacienda, and understood that he was working the La Luz mine that formerly belonged to La Abra Company.*"

But perhaps the most remarkable part of Sundell's testimony is his account of his whereabouts while the Mexican authorities were examining witnesses in court at San Dimas, in opposition to the Company's claim, in 1871 and '72. He seemed to appreciate the importance of the question why, when he was living at San Dimas at that time, and was on intimate terms with Granger, who was examined so frequently by the Mexican authorities, he himself had never been put on the stand.

In his direct examination in this suit he corrected a mistake that had occurred as to his residence in his deposition at Mazatlan, and made a particular and careful statement on the subject. He stated in answer to question 27, in this suit (*Record*, 519), that he had been altogether ten years in Mexico, at San Dimas, where he arrived in 1865, and that he had been absent from the country "about two years." The subject was again taken up by complainant's counsel and the period of this absence defined (*Record*, 519):

> "34. Q. You said, I believe, that you were two years absent from Mexico?—A. Yes, sir.

"35. Q. Between 1865 and 1877?—A. Yes, sir.
"36. Q. During *what years were you absent?*—A. 1869 and 1870."

But when he was asked, on cross-examination, where he was living and how he was employed in 1871 and 1872, and *whether he knew or heard at that time that the Mexican authorities were taking testimony at San Dimas, in opposition to the claim of La Abra Company*, for presentation to the United States and Mexican Claims Commission at Washington, he replied (*Record*, 544, answer to cross-ques. 34):

> "Part of 1871 I was traveling in different parts of Mexico, until I returned to San Dimas, *about the month of October of that year.* In 1872 I was *temporarily* absent from San Dimas, visiting new mining camps in Nevada and Utah, *so it happened I was not there when the Mexican authorities were taking testimony in San Dimas in opposition," etc.*

So he was absent from Mexico in 1872—"*temporarily*"—as well as in 1869 and 1870. Did he mean to add another year to his absence from Mexico, notwithstanding his previous particular and repeated testimony to the contrary, in order that it might not appear that he was at San Dimas when his friend Granger and so many other witnesses were examined for the Mexican Government in court at that place? Or did he mean by "temporarily" that he was absent only a part of the time from San Dimas in 1872? He evidently wished to make a "change of front" for a strategic purpose. I quote again from his direct examination (*Record*, 519):

> "27. Q. How long had you been in the Republic of Mexico in the year 1877?—A. *Ten years*, altogether. *I was absent about two years.*
> "28. Q. When did you first go to the Republic of Mexico?—A. In 1865.

"29. Q. To San Dimas?—A. To San Dimas.

* * * * * * *

"34. Q. You said, I believe, that you were *two years* absent from Mexico?—A. Yes, sir.

"35. Q. Between 1865 and 1877?—A. Yes, sir.

"36. Q. During what years were you absent?—A. 1869 and 1870."

But, in his cross-examination, to prevent it appearing that he was accessible to the Mexican authorities as a witness at San Dimas in 1872, he includes that year also in his absence from Mexico.

Why did he conceal the remarkable fact in his Mazatlan deposition and in his direct examination in this suit that three or four months after he returned to San Dimas from such a prolonged absence, in October, 1871, he left San Dimas and Mexico again for another year? And why, in both his previous examinations, did he number and designate the particular years of his absence from Mexico, omitting 1872 in both cases, although questioned and answering so particularly on that subject?

In answer to cross-question 35, Sundell said (*Record*, 544):

> "I did not have any conversation with Granger as to any of his various examinations by the Mexican authorities during that time (1871 and 1872), *as I was not there.*"

But *he was there*—even on his own showing—within a few days of Granger's second examination by the Mexican authorities on October 6, 1871, and there he remained until he left the country again—if he really did leave it—in 1872. But supposing he was absent for part or all of that year he could have been examined in 1873, or at any time on a proper showing prior to the argument of the case before the Commissioners in 1875. The

Mexican government did not file its evidence with the Commission until October 30, 1873. (*Record*, 106.)

Sundell testified in answer to cross-question 57 (*Record*, 545):

> "*Nothing was ever said to me about giving my testimony on behalf of the Mexican Government while the Claims Commission was in session at Washington from 1869 to 1875.*"

But supposing that Sundell, after such a lapse of time, could properly be examined as a witness now—when he might have been examined twenty-five years ago—what material part of the evidence on which the award was rendered has been disproved or beclouded by his examination in this suit?

Has anything been proved by him that shows or tends to show that Sir Edward Thornton's award was obtained in whole or part (in the words of the act) "by fraud effectuated by means of false swearing or other false and fraudulent practices on the part of the said La Abra Silver Mining Company, its agents, attorneys or assigns?" Take the value of the ore abandoned at the hacienda and the mouth of the mines. The testimony on that question was conflicting, and even if Sundell had assayed a sample here and there, the results would not have been conclusive, because there would necessarily be variations in such a mass of the raw material. But he never assayed any of the Company's ores, and it is respectfully submitted that in view of the foregoing analysis of his testimony and his evident bias, nothing that he said in opposition to the Company's claim should be believed unless otherwise corroborated.

He testified to certain facts, otherwise corroborated, in the Company's favor; *e. g.*, that the mill they put up at Tayoltita was "the best that could be had at that time in California," and that it was "judiciously located and

constructed" (*Record*, 524); that the Company's mill man, Elder, was a competent assayer (*ib.*); that he saw the Company's letter-book in Granger's possession at San Dimas several years after the latter had moved to that place from Tayoltita (*Record*, 528); that "*very soon after Exall left*," he [Sundell] saw and translated Exall's letter of February 26, 1868, to Granger, and made another translation of it "which was legalized [in court] in 1873." (*Ib.*, 529, 530.)

This shows that the most important of Exall's letters—the one purporting to put Granger in charge of the Company's property—and the press-copy book itself were shown by Granger at San Dimas (instead of being concealed by the Company in New York) and could have been obtained by the Mexican authorities from Granger while the claim was pending before the Commission. (*Supra*, 109–111.)

Testimony of Francisco Torres.

The other of the two witnesses produced in this suit, out of the five named, by Mr. Attorney-General in that part of the bill now under discussion, was Francisco Torres, a Mexican miner of superior grade, who, however, could neither read nor write, and did not seem to have the remotest conception of the difference between what he conjectured and what he knew.

Torres, like Sundell, could have been examined by the Mexican government in opposition to the Company's claim while it was pending from 1870 to 1875, before the Commission, for, as he said in his testimony before the Senate subcommittee in 1889, he was always at San Dimas, and there would have been no difficulty in finding him. (Rep. No. 2705, Sen., 50th Cong., 2d Sess., 528.) *Torres in fact was examined in court at San Dimas in 1872*, touching the disposition which Granger had made of some of

the articles belonging to the Company, but for some reason his testimony was not submitted to the Commission. (*Ib.*, 502, 528.) He was examined by counsel for the complainant in this suit on the 9th and 10th of October, 1894, at San Francisco, where he had been sent from San Dimas by the Mexican government. He was cross-examined in Mexico, December 19, 1894, upon cross-interrogatories prepared by the Company's counsel in Washington, and his testimony is printed in Complainant's Evidence, 87–104. (*Record*, 547–564.)

He was asked in his cross-examination (*Record*, 559, cross-ques. 16) whether he knew of any reason why his testimony was not or could not have been taken and submitted to the Claims Commission while in session at Washington, and he replied—

"*I do not know of any.*"

The character of his testimony in this suit will appear from the following illustrations:

> "1. Cross-question. In answer to question 17 in your direct examination, you said that *El Rosario mine was never worked by La Abra Company.* On what grounds did you make that statement?
> "A. *I was there myself.*" (*Record*, 557.)

Now, it is not true that the Company never worked El Rosario mine. Indeed, quite a number of witnesses for the Mexican government, in the original trial, as may be seen from their answers to the 3d interrogatory, testified that "the American Company *directed their attention principally to the Rosario mine.*" (*Record*, 107, 108, 109, *etc.*) This contradiction seems to have escaped the notice of complainant's counsel, who, depending upon Torres, asserted that "La Abra Company did not work that mine at all." (Mr. Maury's Brief on Final Hearing in the Court of Claims, 141.)

Moreover, when Torres said he *was there*, he could only have meant in the San Dimas District, for he testified in the Senate examination that "*during the time La Abra Company was engaged in working the mines, he was living in San Dimas.*" (Rep. No. 2705, Sen., 50th Cong., 2d Sess., 515.) And he never noticed the Company's ore pile at the hacienda or was inside any of its mines "*until after La Abra Company had gone.*" (*Ib.*, 519; *Record*, 549, ans. to 41st ques.; 558, ans. to cross-ques. 5.)

It is true that La Abra Company did comparatively little work in the Rosario mine, and did that little near the close of its operations. But Torres was mistaken when he said that the Company never worked Rosario, and the other Mexican witnesses were also mistaken when they said that the Company turned its principal attention to that mine. But they may have included "La Luz" (which was largely worked by the Company) in Rosario.

And Torres made a still graver mistake when he said, in answer to question 24, that La Abra Company worked "*La Luz and El Cristo only.*" (*Record*, 548.) It appears from the superintendents' letters in the letter-press copy book (*Record*, 239, 244, 265, 266) that the Company worked La Abra, Arrayan and its dependencies, Talpa and Sanz, as well as La Luz and El Cristo. This mistake on the part of the Mexican witnesses may have arisen from suggestions of some Mexican official who had seen the imperfect transcript from the original ore books, which is among the books and papers produced in this trial by the Mexican Consul-General Coney. The original ore books contained pencil entries of the weights of the sacks of ore as they were weighed at the scales, and were merely temporary. Such a book was kept hanging alongside the bookkeeper's desk. Exhibit 40 (the transcript from these ore books) was not brought

down later than 1867. (*Record*, 618, 619.) In Colonel De Lagnel's direct examination, he said that he was satisfied that Exhibit 40 could be relied on as far as it went, but its incompleteness was exposed as follows in his cross-examination (*ib.*, 619):

> "Q. Do you see any entry there about ores from Talpa?
>
> "A. No, sir, I don't.
>
> "Q. Do you see any entry there about ores from Arrayan?
>
> "A. No, sir; only from the two mines La Luz and El Cristo.
>
> "Q. So that the record can not be a complete record, if *as your letters to Garth say*, you took out ores from Talpa and Arrayan?" (No answer.)

In his letter of Aug. 16, 1866, to Garth (*Record*, 239), De Lagnel said that he had put small gangs into Jalpa [Talpa] and Arsallas [Arrayan], and in his letter of Sept. 7, 1866, he informed Garth that they were "working in La Luz, El Cristo and Arrallon [Arrayan] with the same force as before." (*Record*, 244.)

The extracts from the Company's books (*Record*, 745), show that only $180.90 was spent on Rosario, while over $20,000 was spent on La Luz, over $10,000 on El Cristo, nearly $3,000 on La Abra, nearly $2,000 on Arrayan, and over $1,000 on Sanz.

The nature of Torres' testimony and his ideas of what constituted a knowledge of facts will be further illustrated by what follows (*Record*, 557):

> "2. Cross-question. In answer to question 20 in your direct examination, you said that those gentlemen (the former owners, Del Valle and Manjarrez) lost about $40,000 from working La Luz mine. On what grounds did you make that statement, and within what dates was the loss suffered?
>
> "A. I know because I was working for them

there at the smelter. It was *during the two years just prior to the sale of the business by them to the American Company.*"

Being probably unaware that the Umpire allowed only for actual expenditures, and not for the alleged value of the mines, Torres may have thought that he could help Mexico in this suit by belittling their value and suggesting that Del Valle and Manjarrez had imposed upon Garth and Bartholow. Torres could not read, and did not know what Del Valle and Manjarrez had testified, on behalf of the Mexican government, in the original trial, as to the yield of the mines before they were sold to La Abra Company. If Del Valle and his partner had lost $40,000 on La Luz "*during the two years just prior to the sale of the business by them to the American Company,*" he could not have been so disingenuous as to testify that, while his mining operations sometimes produced as high as 200 cargas a month—

> "It never was a business productive of *large* gains, and only yielded *enough* to enable the mines to be kept in such condition as to make them salable to him." (*Record*, 139.)

"A respectable gentleman," with "no motive to testify falsely," and "not afraid to tell the truth,"* would never have concealed a loss of $40,000 in that way. But, if his testimony seems guarded, it should be remembered that he was testifying, as a witness for the Mexican government, five years after the sale of his mines to the Company, and that meanwhile the Company had abandoned those mines and all of its personal property at Tayoltita, and that its claim for damages was then pend-

*So described by Mr. Maury in his brief on the final hearing in the Court of Claims, p. 47.

ing against Mexico, where the prejudice against all such claims and their supporters was intense and inveterate.

Del Valle's partner, Ygnacio Manjarrez, was more outspoken, and testified—also as a witness for Mexico before the Commission (*Record*, 111, 2d answer)—

> "*That during all the time that said mines were worked by them, they produced good profits up to the year 1865.*" (*Record*, 111, 2d answer.)

It was in 1865 that these mines were purchased from Del Valle and Manjarrez by Garth and Bartholow for the Company, and hence the contradiction of Torres by the former owners of La Luz is as complete as possible.

But his contradiction of himself is no less complete, for, from his testimony in the Senate investigation, it appears that he had worked as a smelter at the hacienda San Nicolas for Del Valle and Manjarrez, "*about two months*," and the sale to the company "took place one year after he had been working there." (Rep. 2705, Sen., 50th Cong., 2d Sess., 505.) He said that "*the only mine they were working was La Luz mine*," and that he "could not say what was the character or the quality of the ore taken from that mine, because his work was done on the mineral after it was refined." But he stated that "the result was very good." (*Ib.*, 506.)

When he testified in the Senate investigation that "*the result was very good*," did he believe or imagine that Del Valle had lost $40,000? And, if so, why did he not say so then? He said nothing of the sort. Neither did his friend Somero who came up with him to Washington and testified in the same proceedings. Somero, who had tried his luck in El Rosario and had occupied the Company's hacienda subsequent to 1873—five years after the

Company left—was examined as to "*the results of the working of the mine (mines) by Manjarrez and Castillo del Valle when they jointly owned them*," and he testified that "*they did not lose by the operation*, and perhaps obtained some benefit." (Rep. 2705, Sen., 50th Cong., 2d Sess., 542.)

Does it not seem preposterous for the complainant to produce in this suit a witness like Torres, who not only contradicts himself and the other new witness, Sundell, but also the Mexican witnesses whose testimony for Mexico before the Commission, as cited above from Exhibit A, forms part of complainant's bill?

Torres said, referring to Exall (*Record*, 552):

> "With Mr. Mora, *I am certain*, he had no relations of any kind, and the same thing I can say in regard to Macario Olvera."

Now, Mora was the Prefect at San Dimas, with whom Exall had so much trouble in June and July, 1867, and it was to Olvera (Mora's successor) that Exall appealed for protection in his letter of January 7, 1868, when he was arrested by Perez. Although so "certain," it is evident that Torres knew nothing on the subject. Like Sundell, Torres lived at San Dimas during all the period of the Company's operations at Tayoltita, and what he did not know of its conduct and concerns had never happened. This is illustrated by his testimony as to the robbery of one of the Company's employes by the name of "Scotty." The fact of the robbery is admitted, but a question has been raised by the complainant whether the robbers were soldiers or bandits.

Torres, however, disposed of the whole subject as follows (*Record*, 551):

> "59. Question. Did you know a man by the name of Scott or Scotty in the employ of the Company?

"Answer. No, sir; I was not personally acquainted with him. I might have seen him, but I do not know that I knew him.

"60. Question. Did you ever hear of his being robbed by the troops?

"Answer. *I do not believe he was ever robbed, because no robbery ever took place at Tayoltita. No robbery has ever been committed at that place.*"

This is how the complainant proves by Torres that all the material testimony for the Company was false.

Torres swore in the Senate investigation that Granger remained at the Company's hacienda "*three or four years after the Company disappeared.*" (Rep. 2705, Sen., 50th Cong., 2d Sess., 512.) It was considered necessary at that time to support Mexico's theory that Granger remained for several years after Exall's departure as superintendent for the Company, or in charge of its property and affairs, with its knowledge and consent. But incontrovertible facts, inconsistent with this theory having meanwhile been developed, Torres testified at his examination in this suit that Granger remained at Tayoltita after El Mudo (Exall) left, "nearly a year." (*Record*, 555.) But still the time is too long, for Sundell testified, referring to Granger—

"He was living at San Dimas, but he was not employed by Mr. Martin, before I left for San Francisco in 1869." (*Record*, 546, ans. to ques. 62.)

Sundell left for San Francisco in the *beginning* of 1869 (*Record*, 298, "second point;" 547, ans. to cross-ques. 79.)

While Granger may have been a frequent visitor at the Company's hacienda when it was occupied by Judge Soto, it is clear from the testimony that he moved to San Dimas almost immediately after Exall's departure.

Sundell was examined on this point as follows (*Record*, 527):

> "188. Q. You spoke of Mr. Granger as a superintendent of La Abra Company; where was he?—A. Sometimes he lived at Tayoltita and sometimes he lived at San Dimas.
>
> "189. Q. About how soon after Exall's departure did he come to San Dimas?—A. *Very soon.*"

Torres, like Sundell, proves nothing of the fraud, in general or particular, which it is incumbent on the complainant to prove, but does show in support of the Company's claim the following facts:

(*a*) That La Luz produced some quite rich ore which was reduced while Garth and Bartholow were visiting Tayoltita. (*Record*, 553, 554.) Torres said that 80 cargas of ore (24,000 pounds) produced "500 marcos or 250 pounds of silver," which would be worth $4,500, or more than $400 a ton. This, with other circumstances mentioned elsewhere, makes Exall's statement that he obtained $17,000 from 20 tons appear not so improbable as it otherwise might. (*Supra*, 72–75.)

(*b*) That he (Torres), after working La Luz without right or authority of law, as he stated in the Senate investigation (Rep. 2705, Sen., 50th Cong., 2d Sess., 512, 513), denounced the mine, and also worked El Rosario in association with Granger, as appears from his testimony in this suit (*Record*, 556):

> "144. Q. Did you not denounce El Rosario mine?—A. No, sir; I did not. *I only denounced La Luz mine*, and was interested in the mine of El Rosario in shares.
>
> "145. Q. With whom?—A. With Mr. Granger; but Mr. Granger did not perform any work.
>
> "146. Q. Did he put in any money?—A. Not a cent."

(c) That Torres was in possession of the Company's hacienda and mines for three years subsequent to Exall's departure. This seems to have been quite a surprise to Mr. Lines, by whom Torres was examined (*Record*, 549):

> "37. Q. About how often did you personally go to the mine or the hacienda of La Abra Company while it was in existence in Mexico?—A. Sometimes I would go there once or twice every three or four days, every week or every month; I would go there on business sometimes. *I was also living there during a period of three years.*
>
> "38. Q. *Living where?*—A. *Living at the hacienda. I established a hacienda there.*
>
> "39. Q. *At Tayoltita?*—A. *Yes, sir.*
>
> "40. Q. *Was this while La Abra Company was working there?*—A. *No, sir; it was afterwards. It was two or three years after the mines had been abandoned by La Abra Mining Co.*"

Mr. Lines seems still to have thought it was another hacienda which Torres had "established" in Tayoltita, and at which he lived for three years. But Torres had taken possession of the Company's hacienda and was working its mines—at first just as Soto, the stepfather of Granger's mistress, had done—without authority of law but *with Granger's permission*. How important it was for them to pretend, if their possession was challenged, that *he had charge of the Company's affairs!* And this they did in spite of the fact that so far as the record shows not a word had passed between him and the Company, either way, from the time of Exall's departure!

The following is from Dahlgren's deposition which was taken in September, 1872:

> "I know, too, that a Mexican citizen whose name is Francisco Torres, and who is *now* and has been *for the past year and more* the occupant of said haciendas and mining property and machinery of said Company, *claims ownership of the same*, and that he

works the mines of claimant successfully by 'Patio' process, a part of them under a denouncement made of the Rosario mine in the name of one Granger, an Englishman." (*Record*, 96.)

(*d*) This denouncement in the name of Granger was, of course, intended to make a record that would conceal the fact that another Mexican was trying his luck with the Company's property, after Soto, but it disposes of the pretence that Granger was, or thought he was, the Company's superintendent or its agent in any sense, for under Mexican law, as we have already seen, no superintendent or employee of a mining company could denounce a mine in his own name within a thousand yards of any mine belonging to his principal. He could only act in this respect for the company of whose interests he had charge. And if the Mining Deputation of the District, or any official acting for the Mexican government in the matter, had allowed Granger's denouncement when they believed or had reason to suspect that he was superintendent or agent for La Abra Company at the time, they would have made themselves amenable to punishment for malfeasance in office.

(*e*) Torres' testimony shows, by comparison with that of other Mexican witnesses, that a large part of the Company's ores was packed off from the Company's hacienda between the time when Exall left and the time when Torres first saw the pile in the "patio." There were 1,000 tons of ore on the "patio" when Exall left Tayoltita, in March, 1868, and when Torres first saw the pile, which was between 1869 and 1871, there were but 500 or 600 cargas, or say 75 tons, remaining. So he testified in the Senate investigation (Rep. 2705, Sen., 519), but when he testified in this suit he changed the figures to 5,000 or 6,000 cargas, or about 700 or 800 tons! (*Record*, 550.)

(*f*) Torres' testimony shows (corroborated by that of Hermosillo and Somero in the Senate investigation) that one of the Company's mines (La Abra) was supposed to be so rich below the old workings that one of the most experienced of Mexican miners (Ygnacio Manjarrez) denounced it after the Company left, and was engaged in tunneling it when he died (*Record*, 549):

> "31. Q. Did it strike the perpendicular shaft?—A. It did not reach the shafts; he died before the same was completed." * * *
>
> "33. Q. Do you know how much it cost him to open that tunnel?—A. It must have cost him very near $70,000; he expended that amount himself alone."

(*g*) What Torres said, with reference to his experience in *La Luz*, about the uncertainty and the ups and downs of mining, supports the Umpire's views on that subject, and justifies his decision not to allow the Company for the alleged *value* of the mines, but only for the amount actually invested in the enterprise and interest (*Record*, 554):

> "107. Q. Did you ever see the ledge from which these 80 cargas came?—A. *Yes, sir; I saw it, and I was afterwards the owner of it*, and I also lost $9,000 by the operation, having been induced to make the denouncement by reason of the richness of the ore. I made the denouncement after the mine had been abandoned by the Americans. *It very often happens that rich veins are found after working the mine;* then the ledge disappears and *another rich vein is discovered.* This happens after large sums of money have been expended in developing the mine.
>
> "108. Q. Did you see this vein before the sale to the Company?—A. *Before and after the purchase was made.*
>
> "109. Q. Did you see it while the Company was

operating the mine?—A. No, sir; *I did not go to the mine,* and did not see it.

"110. Q. What became of that vein when you did see it, after the Company abandoned the mine?—A. I have already stated, and now repeat, that *two years afterwards I denounced the mine.*

* * * * * *

"113. Q. When you say the vein is still there, you do not mean the rich ores are still there?—A. *Rich ores may be found, but nobody knows where.*"

If Torres' statement that he lost $9,000 in La Luz is of a piece with his statement that Del Valle lost $40,000 in that same mine, how much did Torres make?

We come now to Mr. Attorney General's specifications of the facts which he undertakes to prove by the witnesses and documentary evidence designated in the bill. And it is to be observed that he does not supply any of the necessary particulars of the general charges of fraud contained in the XVth paragraph, but says—

> "that the said documentary evidence and the said witnesses will enable your orator conclusively to show *the facts in the XVth paragraph of the bill alleged,* and also the following, which your orator says are the facts, to wit," etc., etc.

Specifications in the XVIth Paragraph of the Bill.

These specifications, as set forth in the XVIth paragraph of the bill, will now be examined.

> (1) "That there was no hostility toward said defendant La Abra Silver Mining Company on the part of Mexican officials or people, but that, on the contrary, their relations to its officers were friendly."

This allegation, which was to be conclusively shown by the witnesses and documentary evidence designated in the bill, is disproved by the press-copy book, which furnishes, in Exall's letter of July 14, 1867, to Garth (*Record*, 272), an epitome of the Company's case:

> "*The officials are getting daily more troublesome; their demands are all foolish and very unjust*, but we have to do the best we can with them and take things as quietly as possible."

The same letter-book shows the seizure of the Company's lower hacienda by the local magistrate (Soto) against the law and in collusion with the other local authorities, as detailed in Exall's letters of December 5, 1867, to the Prefect Olvera at San Dimas, and to Señor Del Valle at Durango (*Record*, 278, 279), and it also furnishes the opening chapter of Exall's imprisonment by Perez, and his unavailing appeal for protection to Olvera (*ib.*, 280, 281), which will be noticed more at length under specification (9.)

The following from De Lagnel's testimony will show that instead of the complainant's proving by this witness, as it promised to do in the bill, that there was no hostility, etc., it has proved the very reverse, *i. e.*, hostility to the United States and the Company of the most intense and inveterate kind (*Record*, 502, 503):

> "96. Q. In that examination before the Senate Committee on the subject of the Mexican hostility to the United States and Americans in general, you spoke of a scheme which General Butler was suspected of entertaining. What was that scheme? (Objected to as incompetent and irrelevant.)—A. In a general way, it was the occupation of lower California by purchase or otherwise. * * *
>
> "99. Q. You spoke in that same examination of a clerk that was in your employ, a Mexican. What was his name?—A. Sainz.

"100. Q. Referring to him you said in your examination before the Senate subcommittee, at page 95:

"'My own clerk, a young man who was employed in the store, a Mexican, born and raised in San Ignacio, 70 miles from the mines, had been educated in California and spoke English as well as I could. In talking with him one evening, discussing this very thing (General Butler's scheme), he just scouted the idea of the withdrawal of the French being due to the United States Government, and I tried to show him that without the United States, Mexico would never have got rid of the French; but he scouted it * * * I said, speaking to him: You ought not to give heed to these reports * * * because the Americans are friendly to you. They certainly have shown it in this late action of the government in assisting in ridding you of this foreign control. He said, *we hate them.* * * * *It was taught us by our fathers. They have told us all, and they keep at it.*'

"Now, what have you to say in regard to the hostility and prejudice that existed as a matter of fact in the minds and hearts of the Mexicans towards the United States and our citizens at the time you were there? (Objection by Mr. Lines.)—A. I am not prepared to give any answer to that. I merely mention incidents in my knowledge and leave you to infer yourself.

"101. Q. And those incidents are true?—A. Yes. I can see the picture before me now, that boy talking to me."

Colonel De Lagnel also told of an old man of more than average intelligence, who, when the subject of General Butler's reported scheme "to seize the upper States" was the topic of conversation, declared that while he was always glad to see Americans or anyone else who came with the right motive, "*the moment he was satisfied* they came there for the purpose of seizing their government,

or interfering in any way, *he would cut their throats.*" (Rep. 2705, Sen., 50th Cong., 2d Sess., 95.)

It is remarkable that the furious resentment which was aroused in the San Dimas district by those rumors of forcible annexation, and the fact that such rumors were in circulation there and were believed by the people, should be proved by the most intelligent and trustworthy witness that the complainant has produced; and this is all the more remarkable in view of the attitude of incredulity and scorn which the complainant's attorneys have assumed towards the existence of those rumors, and the feeling they aroused.

Having returned from Tayoltita to the United States in the spring of 1867, Colonel De Lagnel could not testify as to the immediate circumstances under which Exall abandoned the Company's property in the spring of 1868, but could and did reveal, however reluctantly, something of the hostile atmosphere and the perilous situation in which he left Exall when he himself went home.

In his testimony before the Senate subcommittee, Colonel De Lagnel had said that Soto, the local justice of the peace (with whom Exall had afterwards to deal), kept a wine shop and gambling place directly across the road from the Company's hacienda, which was much frequented by the Mexican miners in the Company's employ. Colonel De Lagnel was further examined in regard to this significant fact in his cross-examination in this suit, no attempt having been made by the complainant to prove by him, as promised in the bill, "that there was no hostility towards the Company on the part of the Mexican officials or people, but that, on the contrary, their relations to its officers were friendly." Colonel De Lagnel had evidently been very much prejudiced against the Company's case by "the double-column

book" which had been given to him by Mexico's counsel and which he had read before he was examined in the Senate investigation—the "double-column book" containing the infamous and now abandoned charges of "forgery," shortage in his army accounts, and convictions by court-martial against General Adams—and he seemed averse to say anything that had a tendency to strengthen the Company's case; but just on that account his testimony, where it is favorable to the Company, should have all the more weight:

"78. Q. In your examination before the Senate Committee you spoke of Soto selling mescal to the miners and others. Will you please explain what mescal is?—A. It is a product of the hemp.

"79. Q. In that same examination, you spoke of gatherings at his shop on Saturdays and Sundays, at which there was drinking and gambling, and you said that those proceedings would sometimes become saturnalian?—A. Well, they would last all night, and you would find them stretched out in the morning, the candles burned out and every one asleep.

"80. Q. So far as you know, did any of the miners in your employ frequent that shop?—A. I presume most of them did; I don't know. I never asked any questions. I never was there.

"81. Q. You spoke of Soto in that same examination as exercising a pernicious influence on the miners and as being hostile to the Company. What did you mean by that?—A. That is derived from hearsay, and not my own knowledge. As I say, I did not know the man except to pass him and bow to him. He would always bow respectfully to me, but with a countenance that indicated no love.

"82. Q. Let me ask you whether he was a magistrate or justice of the peace at the time you were there?—A. He was, yes, sir. He was elected, I believe, a judge by the people.

"83. Q. Before you left?—A. Before I left; I think so." (*Record*, 499, 500.)

At Tayoltita the miners were "the people." And on one occasion when De Lagnel, on account of military exigencies, could not get money from Mazatlan where he had it on deposit to pay the miners' wages, he and his associates were threatened with an "armed demonstration" with which De Lagnel thought that Soto himself was concerned.

Soto's interest in the miners' pay was explained by De Lagnel as follows:

"* * * If I referred to him, I don't recollect what I said, but if I referred to him *it was this: that, being a liquor dealer, he wanted the ready money to answer for his wine, and the gamblers wanted the ready money to lay down on the little green cloth.*" (*Record*, 500.)

In the Senate investigation Colonel De Lagnel had been asked whether the revenues and disbursements of the Company were a source of profit to Soto's business, and he had replied:

"I presume there was considerable profit. The ready money, from what I was told, and *my own observations day by day*, passed either to the man who dispensed the wine or the man who dealt in cards, and that the cessation of the stream of supply caused this *ill feeling* on the part of these people, and that these gamblers and others—I will not throw the whole burden on this old man, but *I thought he was in the plot;* that is, so far as that demonstration at the hacienda." (*Record*, 500.)

When the Company commenced to pay the miners mostly in supplies, the interference of the Prefect Mora was in Soto's interest, for when they were paid in provisions and goods they had little or nothing to spend at

his place in drinking and gambling. The opening sentence of Mora's order of June 3, 1867, shows that it was incited by representations which had been made by Soto. It was addressed to Soto in his official capacity, and opened thus: "From *your communication* this Gefetura has learned," etc. (*Record* 54, Exhibit Y.)

Returning now to De Lagnel's testimony in regard to the local judge (*Record*, 500, 501):

> "88. Q. * * * In what way did you connect this old man Soto with that hostile demonstration?—A. Simply from the fact that *his house was a place of resort*, and there must have been an organization, or plan or design of some kind, and they must have done it when they came together, and as *that was the only gathering place, and that is where the wine was dispensed*, I took it as a matter of course that he may have influenced them. I can not say that he did influence them. I did not hear him. I am only giving an inference.
>
> "89. Q. In that same examination you spoke of the attack on the Rosario and Candalaria mines, and you said that the mines were abandoned because of the attack and the murder of the engineer; whether more than one you did not know, but you knew there was loss of life. How did you know that? (Objection by Mr. Lines.)—A. I was told by *a man who was present* and who was afterwards employed by me."

In the Senate investigation Colonel De Lagnel said, referring to this murderous attack:

> "*Everybody knew about it.* I had workmen in my employ who were there at the time it occurred." (Rep. 2705, Sen., 50th Cong., 2d Sess., 108.)

He explained that while it was not "common rumor," as he understood the phrase, that American mining companies could not get along at all in Mexico—

"*The Americans connected with the companies, when I would meet them, would speak that way of the difficulties and adverse circumstances under which they labored.*

"Q. Was that at the time when you were employed at the mines?—A. Yes, sir." (*Ib.*, 108.)

And it appears from his account of the armed demonstration against La Abra Company's hacienda that the ringleader reminded the men of what had been done at Candalaria:

* * * "The young clerk who was in attendance at the store (and who understood Spanish) was standing then in front of them, and I was sitting back of him (and he) said to me, 'Colonel, if you are going to do anything, you had better be quick about it.' I asked him what he meant. He said that the fellow who was talking *was inciting these men to make an attack upon me, and he told them not to wait.* The clerk told me that *the man was talking about the Candalaria* affair, which had taken place before my time there, I believe. They had risen there and killed some officer and sacked the place." (Rep. 2705, Sen., 50th Cong., 2d Sess.)

Colonel De Lagnel's conviction as to Soto's hostility to the Company and as to the part he played in the threatened attack on the hacienda, was expressed very clearly in the Senate investigation, and the incident is set out at length in the minority report of the committee under the head of "*New evidence in regard to the justice of the peace at Tayoltita.*" (Rep. 2705, part II, Sen., 50th Cong., 2d Sess., 16–19.)

"Q. I understood you to say that this man Soto was a pestiferous sort of a man, or you used some characterizing word?—A. *I considered him so.* I thought he was an *underhand*, a very quiet man. He did not show anything exteriorly, for he was always courteous when I saw him, but I thought he was *secretly undermining the whole affair.*

"Q. Why did you think that?—A. *I was so informed.* I think it was attributed to *him* and others—the excitement among the workmen when the money gave out, when *they came in, each man armed with a machete hidden under his blanket.* * * * I was told that *Soto was at the bottom of this affair;* that he was *inimical to the establishment,* and *to me being connected with it,* for what cause I do not know, and that this evidence of bad feeling arose not so directly from the position in which I was placed, but from *the desire of the money that was falling and from the selling of the mine,* etc. * * *

"Q. Now, if a *Government official* was engaged in that kind of operation it would be very likely to excite and inflame these people and make them antagonistic to you?—A. *Anybody who had influence with them.*

"Q. Yes; and if anything of that kind came from a Government official it would be very likely to excite their animosity and hostility to that Company, would it not?—A. *I have no doubt of that.*

"Q. Why did you think this came from Soto, that he was the man who was doing it?—A. Because he kept a store *which conflicted to a certain degree with the store at the hacienda.* They were only *across the roadway,* and probably *not 100 feet apart.*

"When I went down I supposed that the domain belonging to the Company would be under my control wholly. When I arrived there *I found this house up;* this man's domicile. *He owned the house,* and I never clearly understood my relations with him, *how far I dared with safety to the interests of the Company interfere with him.* I would rather have had him away entirely, but I hesitated to do anything to militate against the interests of the Company.

"*I know he influenced these people, for these weekly entertainments were held in front of his house, and the liquor, the mescal, was sold in his little shop or store.*" (Rep. 2705, Sen., 50th Cong., 2d Sess., 91, 92.)

Alluding to the excitable disposition of the miners,

especially when under the influence of "mescal," and to a visit he made to Mr. Rice's hacienda at San Dimas, when the inmates "were expecting an attack at any moment, and were prepared to resist it," Col. De Lagnel said:

> "These explosions only occurred, I may say, when they were possibly half full of liquor, but that is very frequently. *That night I could hear as I lay down to sleep the cries of these people blackguarding and cursing the people in that hacienda;* but there is some excuse to be made for that class of the population. When they were sober I never had discourtesy from any of them." (Rep. 2705, Sen., 50th Cong., 2d Sess., 109.)

But the morning the Company's miners came armed to the hacienda, they were all sober (*Record*, 515):

> "244. Question. So that on this occasion drink did not seem to be the exciting cause of the demonstration?
>
> "Answer. No, sir; the workmen who came up armed were all sober; every man was perfectly sober."

The next specification in the XVIth paragraph of the bill is as follows:

> (2) "That 'prorogas,' or extensions of title, were frequently granted to said Company, and that said Company received from officers of the Republican army special military protection for its property and for the mule trains belonging to contractors for said Company during the war between the Republican Government of Mexico and the Imperialists."

This specification might be proved by the complainant, or admitted by the respondent, without at all affecting the issue in this suit; for the Company never complained of the Mexican officials who granted "prorogas," or of those officers of the Republican army who neither

seized nor allowed their subordinates to seize the Company's supply-trains. Of course, the Company's complaint of seizures and detentions did not mean that there was always a failure of protection or that none of their trains ever got safely through.

The next specification in the XVIth paragraph of the bill is as follows:

> (3) "That no onerous taxes were enforced, and that but one loan, and that of a general character, was levied upon the Company, which Company refused payment with impunity, under the plea of lack of means."

But this specification, instead of being proved, as promised in the bill, is actually disproved by De Lagnel on his cross-examination in this suit, where his attention is called to one of his letters in the Company's press-copy book (*Record* 610):

> "41. Q. Now, at the top of page 289 (Ex. B, *Record*, 253) you say, 'we are dragging along in the dark, and hoping, but not knowing, that any advantage will be derived from the change of rulers. One thing appears clear—that we will not have to pay duties to Imperial Customs and then *do the same* to the Liberal officers.' What did you mean in regard to paying duties to the Imperial and the Liberal officers?—A. The French and Imperialists held the port (Mazatlan) and *collected duty there*, while the Liberals held the country in which the mines were placed and would *demand a tribute oftentimes on the way up*, or sometimes."

It appears from the deposition of Pedro Echeguren, one of the leading merchants of Mazatlan, in support of the Company's claim before the Commission, that—

> "Much of the Company's supplies, machinery and even money, *was received from the steamer or vessel direct*, and their mule teams (trains) packed at the

wharf for their mines, without being consigned to any house here. This was going on while we were doing business for the Company, but I can not say what proportion or amount of such supplies were so received." (*Record*, 104, ans. to ques. 8.)

A notable instance of the detention of one of these supply trains is given by an unimpeachable witness—Wm. G. S. Clark—who himself advanced the amount demanded by the military authorities (*Record*, 62)—a payment which is proved by the books of the Company produced in this suit by the Mexican Consul-General Coney. (*Record*, 753.)

The remaining part of this specification—as to the loan and the Company's refusal to pay it—is also disproved by Colonel De Lagnel's testimony. The "loan" in question was levied by Colonel Valdespino, who had arrived at San Dimas with a detachment of "Liberal" cavalry in wretched condition, and the Company's share of the levy, or what Colonel De Lagnel thought the Company ought to contribute, he paid in kind—mohair and cotton goods, blankets, and hats—as told in his letters (*Record*, 236, 237), and in his examination in this suit (*ib.*, 488):

"They wanted food and *clothing* and money, and they wrote to me saying that they had apportioned it on the two mining companies, the one at San Dimas and the one with which I was connected, levying one-quarter upon us, and the other half was to be borne by the citizens. I was advised to comply. They wanted $300, if I recollect right, in money. I didn't have the money to give them, and didn't intend to give it even if I had it. I was advised to do so, or *they would come there and rob the place, as it was said to be the habit.*

"Q. By whom were you advised?—A. I was ad-

vised by a man named Norton, *who had married a Mexican wife.*

"Q. The same man who was your clerk?—A. Exactly. *He had been in the Liberal service.* He said to me, 'It will be to your interest to do it; *they will sack this place if you don't.*' * * *

"Q. What was the result?—A. I sent them a few goods—*some stuff they wanted*—blankets and hats. I sent them some goods, cotton goods, and wrote a courteous note to each one of them (the Prefect and the Colonel), expressing regret that I could not comply with their wishes, and stating that we had no money, because the mines had never turned out a dollar. They wrote me an acknowledgment and sent a receipt for the goods and courteous acknowlments. That was the end of it."

Does this testimony of Colonel De Lagnel justify the complainant's allegation that the Company "refused payment with impunity?" Were not cotton goods, blankets, and hats of more use to Valdespino and his ragged troopers on their brokendown mules, in that isolated and mountainous region, than money? And had not these supplies cost the Company money? What blight is it that prevents the complainant from making the simplest statement with any approach to accuracy or candor? And why in a solemn proceeding like this should one witness after another have been produced to prove specific allegations which their testimony shows to be unfounded?

A strong side-light shines upon the situation at the mines, and in Mexico generally, from this Valdespino incident (although it is of but little importance taken by itself), and shows the nature of the complainant's allegation that the Company refused payment with impunity. In his testimony in the Senate investigation

Colonel De Lagnel said that he "sent the little gift over" because he was advised—

> "That if we did *not*, these men would come into the little town or pueblo settlement where I was, and *would not only interrupt the work, but possibly break in and rob the warehouse and take out the property.*" (Rep. 2705, Sen., 50th Cong., 2d Sess., 93.)

And as it was, the Company's operations were interrupted, because—

> "The men had left their work, and *their families; some of them had fled from the village in alarm.* They heard this force was there and coming, and *knowing the habits of their own people better than I, had taken that course of procedure.* * * *
>
> "Q. These were the Mexican forces?—A. *Mexican forces.*
>
> "Q. *And they were running away from their own forces?*—A. *Yes, sir.*" (*Ib.*, 94.)

In connection with this incident, it should be borne in mind, when the testimony which was submitted to the Commission in regard to the seizures and detentions of the Company's trains is considered, that it was "forces" like these, with such necessities and habits as theirs, that the Company's supply trains had been liable to encounter between Mazatlan and the mines since the fall of 1865.

And it should also be noted that in his letter to the Prefect, telling him why he sent goods instead of money for Colonel Valdespino, Colonel De Lagnel spoke of "thousands and thousands of dollars, most of which have been spent among the needy of this district, and *a considerable part in duties paid into the treasury of the district under whose flag Colonel Valdespino is serving.*" (*Record*, 236.)

Complainant's counsel said in his brief on the final hearing below (p. 118):

> "The face put upon this Valdespino matter by Granger and Exall in their depositions is thus demonstrably false. It was not the mailed hand of military power *but the hand of supplication* (the italics are Mr. Maury's) that Valdespino stretched forth, beseeching assistance for his suffering soldiers. To seek to give a different version of the transaction was criminal in Granger and Exall."

But Valdespino said to the Prefect: "*You will levy.*"

Judge Black, in his argument before the Umpire, said of Valdespino's letters:

> "The glove was soft, though the hand within was of iron. It was a very polite request by an officer who had a regiment of soldiers behind him."

Exall's and Granger's testimony in regard to this incident shows on its face that it was hearsay. The event, which in itself was of little importance, happened *before their arrival in Mexico*, and they did not pretend to speak from personal knowledge. But if it was "criminal" in them to represent Valdespino's hand as "the hand of military power," instead of "the hand of supplication, stretched forth, beseeching, etc.," Judge Black must have been a "criminal," too.

But Valdespino's levy was not by any means the only one made upon the Company's property. Colonel De Lagnel testified (*supra*) that "the Liberals would demand a tribute *oftentimes* on the way up, or *sometimes*." One of these demands, to which we have already alluded, is described by Wm. G. S. Clark, in his deposition of May 14th, 1870, in which he mentions the name of the Mexican officer (Donato Guerra), who levied the "tribute," the amount ($600) *which the deponent himself paid to Guerra*, the detention of the train "for four

days by the said acts of the military," and some of the serious consequences that ensued to the Company's machinery for want of a barrel of oil that was on the intercepted train. But, more significant still, this witness tells in detail what Colonel De Lagnel did in the matter, for it was during his superintendency that payment of this "tribute" was enforced (*Record*, 62):

> "That said superintendent of La Abra Company came back to Comacho (where Clark lived) a few days after the loss of the said carga of oil, and tried in every possible way to procure permission of the said commander of the Liberal troops of that district to visit the port of Mazatlan, or the lines of the French, with a view to making an effort to gain admission to the Mazatlan market, in order that he might supply the place of said oil, so much needed by said Company, which had been lost or stolen while in the forced possession of said General Donato Guerra, but he was refused such permission; and deponent further says that *he heard said superintendent of La Abra Company complain*, at the time, that even that circumstance, trifling as it might appear to those not acquainted with the uses and value of such oil for machinery, *had caused a complete paralysis in the work of putting up said machinery at their mining hacienda, as the same had become wet and rusty, in transporting it to the mines, and could not be put in working order in the absence of that material.*"

Of course it was perfectly proper for General Guerra to prevent Colonel De Lagnel from going through the Liberal lines to Mazatlan, which was then in possession of the Imperialists. The wrong was in detaining the Company's train and levying "tribute."

Being a resident of Comacho, in the Mexican State of Sinaloa, Clark could have been examined (just as Del Valle, Avalos, and Granger were) by the Mexican authorities. *So could General Donato Guerra*, to whom

Clark made the payment of the "tribute." This right and the long-continued opportunity of examination on the part of the Mexican government make all that the complainant's counsel says about the vagueness and generality of the allegations of the Company's witnesses before the Commission seem strained and fanciful, and exceedingly suggestive of the want of really substantial objections.

The Mexican District Attorney, Gaona, whose testimony was taken in this suit, thought, without being sure, that *Clark was examined by the Mexican authorities at Mazatlan, in regard to his aforesaid deposition* of 1870, in 1877, *a year after the Commission had adjourned*, but the fact that no copy of his re-examination was included in "the newly-discovered evidence" speaks for itself. And, as previously observed, the Company's books corroborate his testimony.

The next specification of the XVIth paragraph of the bill—

> (4) "That no mule trains were ever taken from the Company and that it never owned any"—

has certainly not been proved, either by the documentary evidence or the witnesses designated in the bill.

It is immaterial whether the mules were owned or hired by the Company. Bartholow, Cole, Clark, and Loaiza say that the Company in Bartholow's time owned some of its mule trains, and one of Mexico's new witnesses (Sundell) says, on hearsay, that "sometimes a nominal transfer was resorted to, to prevent interference of the military authorities." (*Supra.*) It was not the mules themselves, but the machinery and supplies they carried that were of most importance to the Company in its extensive and costly operations at Tayoltita. Even when nothing was taken, the mere detention of the sup-

plies was a serious injury, for it was not only mining operations that were going on at Tayoltita, but various kinds of construction requiring tools and materials, as well as miners' supplies for the Company's store and provisions for the hacienda. Parts of the machinery that had been carried over the mountains on mules lay rusting at Tayoltita, and could not be put in place for want of a barrel of oil that was sent from Mazatlan on one of the intercepted trains, as has already been mentioned.

But nothing was allowed by the Umpire for these seizures or detentions. They do not in any way affect the award, for whether they cost the Company much or little, or whether the Company owned or hired its mules, the amount, whatever it was, went into the Company's total actual expenditure, which, with interest, was all that the Umpire allowed except for the ore on the "patio." The Umpire regarded as an expenditure the amount received from ores reduced, because, according to Exall's testimony, it went into the Company's business at Tayoltita. That portion of the Umpire's award bearing on this point is as follows:

> "The evidence of George C. Collins, with regard to the amount invested, is clear and straightforward. He states it to be:
>
> | | |
> |---|---|
> | From the subscriptions and sales of stock | $235,000 00 |
> | Lent and advanced | 64,291 06 |
> | Due for rent, expenses, salaries, law expenses | 42,500 00 |
> | | $341,791 06 |
>
> "Any so-called 'forced loans' and contributions *must have been paid out of this amount.* To charge them therefore, separately, is to make the same charge twice over. The Umpire takes occasion, however, here to observe that *a forced contribution*

exacted from a train of goods, the property of the Company, in transit from a seaport or elsewhere to the mines, is not in the nature of a forced loan. exacted upon a train of goods, the property of the Company, in transit from a seaport or elsewhere to the mines, is not in the nature of a forced loan. The latter should be recovered by the proper authorities, at the headquarters of the Company, and should be in the same proportion as that imposed upon all the inhabitants of the country. *The former is an arbitrary exaction which is frequently much more prejudicial than the actual money loss, on account of the detention and abstraction of goods without which the mining operations can not proceed.**

"To the above-mentioned amount of $341,791.06 should be added $17,000, which is shown to have been the amount derived from reduced ores." (*Record*, 9.)

This branch of the case is treated more in detail, under the head of "*Seizure and confiscation of the Company's Mule Trains*," in the minority report of the Senate Committee, No. 2705, part II, 50th Cong., 2d Sess., pp. 23–27.

The next specification of the XVIIth paragraph of the bill—

(5) "That its (the Company's) employé was murdered by another of its employés, who was promptly tried, convicted, and shot by the military authorities"—

has no bearing on the question at issue. If it is Grove who is referred to as the Company's employé, his supposed murderer was convicted and shot for the murder of a *woman*, presumably a Mexican, and after he was sentenced he confessed to the part he had taken in murdering Grove, and gave the names of two of his confederates, who, so far as the Record shows, were never

* This evidently refers to the instance related in Clark's testimony (*supra*).

punished. But their escape may have been due to the disturbed condition of the country. (*Record*, 220.) Nevertheless, it is rather singular that the execution of one of Grove's murderers for another murder should tally with the remarkable statement of the Hon. John W. Foster, late United States Minister to Mexico, published in the "Foreign Relations" of the United States, of which this court will take judicial notice:

> "Since that note was written (to Mr. Lafragua in 1874) more than four years have passed, and the list of murdered Americans has considerably increased, but up to the present date I have been informed of permanent punishment having followed in but *a single case*, and that *when a Mexican was murdered* at the same time." (The italics are Mr. Foster's. For. Rels., 1878, p. 650.)

The evidence before the Commission tended to show that *two* of the Company's train masters were murdered, but the murder of Grove, who was an American, was vigorously followed up by General Bartholow and the Mexican Colonel Veja; while nothing seems to have been done in the other case. (See Gamboa's deposition, *Record*, 60; Clark's, 63; and Loaiza's, 72.)

The next specification of the XVIth paragraph of the bill—

> (6) "That no assault was made upon its (the Company's) buildings"—

is also immaterial, for no such assault was the basis of the award. The Umpire found (*Record*, 8):

> "That *the local authorities at Tayoltita and San Dimas*, far from affording to the claimants that protection and assistance which had been promised them by the Mexican government, and to which *they were entitled by treaty*, not only showed themselves a spirit of bitter hostility to the Company, but

> encouraged their countrymen who were employed by the claimants in similar behavior, and even frightened them into refusing to work for their American employers. The conduct of *these authorities* was such, and the incessant annoyance and interference with the claimants was so vexatious and unjustifiable, that the Umpire is not surprised that they considered it useless to attempt to carry on their operations, and that for this reason, as well as from the well-grounded fear that their lives were in danger, they resolved to abandon the enterprise."

But, again, neither the documentary evidence nor the witnesses designated in the bill prove that no assault was made upon the Company's buildings. The only one of the designated witnesses who lived at Tayoltita while the Company was working there, was De Lagnel, and he left the place and the country nearly a year before Exall. So that the evidence which was before the Commission showing or tending to show that an assault was threatened or actually made upon the Company's buildings, remains unimpeached. (*Record*, 52, 154, 171.)

Avalos (the witness for whose credibility Captain Dahlgren vouched so unreservedly) testified (*Record*, 52):

> "I was present at the hacienda of the said Company one night—I think in the latter part of 1866—when an armed mob of Mexicans charged upon the hacienda of the Company, and the Americans there were badly frightened, and retreated back of the hacienda and armed themselves for defense. *I was inside with them.* The Mexicans, as I afterwards found out, thought the Americans too well prepared to meet them, and did not follow up the charge at the time."

The "armed demonstration" described by the complainant's witness, De Lagnel (*supra*), comes pretty near an "assault."

It can not be said that there was no assault on the buildings, because Sundell or Torres or any other non-resident had never heard of it, in view of the fact that Sundell, although so intimate with Granger, swears that he never heard of his contract with Gaona, to the terms and execution of which Gaona himself testifies, and of the other fact that, although many witnesses were examined at San Dimas, and there had been quite an excitement over the arrival of General Adams with an escort, Torres had never heard that a Commission was in session at Washington during so many years to examine the claims of citizens of the United States against Mexico and of citizens of Mexico against the United States, or that La Abra Company had presented a claim against Mexico to that Commission, or that his friend and partner, Granger, had ever been examined as a witness for Mexico in the case. (*Record*, 559.) In this way the complainant could prove by Torres that there never *was* any Commission; that Granger never was examined, that Scotty never was robbed, and that Grove never was murdered! (*Record*, 551.)

The next specification in the XVIth paragraph of the bill—

> (7) "That in only one instance did the Company lose anything by robbery, and that said robbery was committed on the highway by armed bandits, and that the military authorities made every effort to find and punish the offenders"—

is not proved by the documentary evidence nor by the witnesses designated in the bill.

As stated above, Torres never heard of Scotty or of Scotty's robbery. He swore it could not have happened *because there never was any robbery in Tayoltita*, and there could not have been any robbery in Tayoltita, because if there had been he would have heard of it.

Clark's testimony on that subject is unimpeached. The "robbery" was committed or the "prestamo" was collected near Camacho, where he lived, "by an armed party of the said military," and he went with Scotty to the commanding general and made the representations set forth in the deposition. (*Record*, 63.)

The Mexican Commissioner, Señor Zamacona, was inclined to think that the levy on Scotty was "a duty on circulation," as only a part of the funds in his possession was taken. (Ex. Doc. No. 103, H. R., 48th Cong., 1st Sess., 35, 36.)

But General Bartholow deemed it a robbery, and entered the amount, $1,178, in his ledger under "Robbery Account." (*Record*, 745, "balances of accounts," third item from the bottom.)

The Umpire, however, made no separate allowance for this item, because it entered into the Company's actual outlay, which formed the basis of the award.

The next specification in the XVIth paragraph of the bill is—

> (8) "That the difficulty with the local authorities in June and July, 1867—(styled by the superintendent (Exall) in a letter to the treasurer (Garth) 'a little spat with the officials which was gotten through without much trouble')—was due to the cause stated by the witnesses for the defense, to wit, that the superintendent had, as expressed by him in the letter above referred to, 'reduced the cash payment from one-third,' and that the said difficulty occasioned no inconvenience to the Company."

This pretends to quote all of Exall's reference, in his letter of July 13 and 14, to "the difficulty with the local authorities in June and July, 1867," but it omits the following significant sentence, *which is to be found in the continuation of the same letter*:

"The officials are getting daily more trouble-

some; their demands are all foolish and very unjust, but we have to do the best we can with them and take things as quietly as possible." (*Record*, 272.)

Now, as to the *cause* of the difficulty: The Government says it was because "the superintendent had, as expressed by him in the letter above referred to, *reduced the cash payment from one-third.*"

But that was no legal ground for the intervention of the Prefect—far less for such interference as that of which he and the local justice were guilty.

The Mining Ordinances (Rockwell's Spanish and Mexican Law, vol. I), provided that the miners should not be *compelled* to take their pay in goods (chap. XII, sec. III), but left them free to make contracts (sec. X), under the general supervision of the members of the "deputacion de mineria," established in each mining district, *who were vested with exclusive jurisdiction* (chap. III, sec. IV), and were required *to act jointly* (chap. III, sec. III), and *to give both sides a hearing* in matters of disagreement between the miners and their employers (chap. III, sec. V).

There was nothing in the Mining Ordinances to prevent the miners from working, if they chose, for goods or supplies. The Company's expenses had been enormously increased by the rise in the rates for packing and by the losses, exactions and delays connected with the seizures and detentions of their trains. They had a store stocked with supplies that the miners needed and were willing to take, temporarily at least, for their labor, rather than remain idle. If the miners had been unwilling to work, because they suspected that the Company had abundance of ready money, but was determined not to pay any of it out in wages, and if trouble had ensued, there would have been a case for the "deputacion de mineria," whose

intervention was intended to make for peace and the best interests of all the parties.

A copy of the Prefect's order of June 3d, 1867, addressed to Judge Soto, was furnished in July, 1872, to the judge of first instance at San Dimas by the Mexican District Attorney, Hernandez, who was obtaining evidence in opposition to La Abra Company's claim while the Commission was in session at Washington, and is printed in the *Record* at pages 124 and 125. It directed Judge Soto to notify the Company, *through his court*, "that, at least, they should carry out their last contract; that is, that they shall pay them one-third in cash; and, if not, *that they give up the mines to the operatives, to be worked by them as best they may.*"

Being doubtless familiar with the Mining Ordinances, the Mexican Commissioner, Zamacona, contended, in his opinion on the Company's claim, that, by a *mistranslation*, "what was simply a well-intentioned notice or admonition by the local authorities, *assumed the aspect of an act of despotism or a threat against property.*" But he did not contend that the orders of Soto, on whose representations the Prefect's order had been issued, were mistranslated. Mora's order was dated June 3d, 1867. The next day Soto issued the following order (*Record*, 124):

> "SECOND CONCILIATING COURT OF TAYOLTITA.
>
> "In consequence of the official communication of *yesterday*, the 3d instant, received from the gefe politico of San Dimas, I notify you that if you do *not intend to continue working the Abra mines upon the system of thirds, as formerly, that you* FORTHWITH VACATE THE MINES, and allow the operatives to work them for their own account, and that they may lose no more time."

That order from the nearest judicial authority, who should have protected the Company in its legal rights

(and surely none the less if it was in financial difficulty), was followed next day by this other (*ib.*, 124):

> "SECOND CONCILIATING COURT OF TAYOLTITA.
>
> "This court has been informed to its great displeasure that you have not deigned to reply to a communication which was addressed to you twenty-four hours since. I therefore notify you *to come to terms with the operatives about the work* WITHIN TWO HOURS, and, *if no agreement is made by them*, that *you vacate the mines*, that they may lose no more time.
>
> "Liberty and Reform.
>
> "(Signed) GUADALUPE SOTO.
>
> "TAYOLTITA, *July* (*June*) *5th, 1867.*
>
> "To the Superintendent of the
> Abra Mining Company, Present."

Neither Moro nor Soto had any legal right to intervene in the capacities in which they intervened, even if the Company had been in debt to the miners for wages. What they did was a piece of despotic lawlessness, the very thing which Señor Zamacona said it had the "aspect" of being. Judge Black's remarks on this subject, in his argument for the Company before the Umpire, are printed, under a stipulation, on pp. 746–748 of the *Record*. The following is an extract therefrom:

> "Before any discussion of the effect of these extraordinary papers, it must be considered that by the laws of Mexico the *gefe politico* had no jurisdiction or authority whatever in any matters of dispute between the operatives of a mine and the owners of the same. The *deputacion de mineria*, established by law in every mining district, alone had jurisdiction in such cases, and the interference of the *gefe politico* or the local judge was of itself an arbitrary and illegal act. If the superintendent had failed, as is falsely pretended, to fulfill his contract with the operatives, they had their remedy under the mining laws, which are summary in their action. If the Company owed the men for their labor, they had the

means of coercing payment in the most peremptory manner, and there was sufficient property to satisfy any judgment that might have been rendered."

But there is no trace in the orders of any claim of indebtedness on the part of the Company to the miners. The official translator of the Department of State has made a translation of the orders, which, with the consent of the Government's counsel, is given herewith:

"OFFICE OF THE POLITICAL CHIEF
OF THE DISTRICT OF S. DIMAS.

"This office has learned with regret, through your communication, what abuses are committed by those American gentlemen, who, the first time, agreed to pay their workmen entirely in coin, and the second time to pay them half and half, and the third to pay them a third part (in money). You will notify them, in your capacity as judge, by my order, that they must carry out the last agreement at least—that is to say, they must pay one-third in money. *If they fail to do this, they must leave the mines, so that they may be worked by the miners to the best of their ability*, for neither do the mining ordinances provide that miners may be paid entirely in goods, nor does the Government allow such abuses, and it is tired of receiving thousands of complaints on this subject.

"You will bring the contents of this communication to the notice of the American citizen who is in charge of the mines over which you have jurisdiction.

"Independence and Reform.

"M. MORA.

"JUNE 3D, 1867.

"To the Citizen Judge Guadalupe Soto,
sole Conciliator of Tayoltita."

"SECOND CONCILIATING COURT OF TAYOLTITA.

"In pursuance of a communication which I received yesterday from the Political Chief of San

Dimas, I hereby notify you that, *if the work of the Abra Company is not to be continued according to the system of one-third* (*i. e.*, ⅓ in money) *as heretofore*, YOU ARE TO VACATE THE MINES AT ONCE, so that the miners may continue to work for their own account, and may lose no more time.

"Liberty and Reform.

"GUADALUPE SOTO.

"TAYOLTITA, *July* (*June?*) *4th, 1867.*

"To the Citizen Superintendent
of the Abra Company, Present."

"SECOND CONCILIATING COURT OF TAYOLTITA.

"This court sees, to its great annoyance, that twenty-four hours have passed since it sent a communication to you, and that you have not deigned to answer it. Wherefore this court notifies you that you are to make a suitable arrangement with the miners as regards their work, WITHIN TWO HOURS, and if they do not agree thereto, *you are to vacate the mines*, in order that the aforesaid miners may lose no more time.

"Liberty and Reform.

"GAUDALUPE SOTO.

"TAYOLTITA, *June 5th, 1867.*

"To the Citizen Superintendent
of the Abra Company, Present."

Exall says that Moro and Soto were trying to drive the Company out of the mines. I quote from his deposition for the purpose of corroborating it on this point by other proofs. (*Record*, 153):

> "There was no such failure to comply with our contracts with the laborers; that is all a hatched-up story—a mere excuse for driving us away—which has no foundation in truth."

He then tells how laborers had flocked to Tayoltita, hearing that the Company was rich and was paying large wages, and that some of these newcomers were turbulent

characters; how, when the work of construction was finished, the force employed by the Company was necessarily reduced; and how the Company's former employés, when their money was gone, applied for re-employment:

> "They were dissatisfied, or pretended to be, at my refusal, and were readily joined by those mischievous Mexicans and politicians still remaining about Tayoltita; and the said prefect, or jefe, and local judge made complaints because these ignorant and turbulent characters were not employed, and they became very hostile. * * * And said Moro and Soto issued the written communications or orders to me, which are referred to in said defensive testimony, requiring me to employ all the men and work the mines as Soto and Mora directed, or to abandon them to the people to be worked by themselves as they pleased." (*Record*, 153, 154.)

Mora interfered again in July when the Company's superintendent attempted to exercise his indisputable legal right to reduce his force or suspend work altogether for a time in the mines. In the same letter to Garth (July 13 and 14, 1867) cited in the specification of the bill now under discussion, Exall (after mentioning his efforts to employ miners by the share or by the carga) said:

> "If I am not able to get men in the other mines, *I am privileged by the mining laws of the country to stop working in mines 4 months in the twelve. As these mines have been steadily worked over a year, I can safely take advantage of the privilege.*" (*Record*, 271.)

It seems, also, from the same letter, that he had already suspended work at the mines, for a few days, although he was running the mill night and day. (*Ib.*, 271.)

Whereupon the Prefect, ever intent on dispossessing the Company or frightening it away, had, on the 10th of

July, written the following letter, which concludes with a threat that must have gone like a stab to the heart of the superintendent:

"OFFICE OF THE POLITICAL CHIEF
OF THE DISTRICT OF SAN DIMAS.

"It having come to the knowledge of this office that you have brought the work to a standstill in your mines—

"I hereby tell you that such was not the agreement which you made with me. I therefore think that you pay no regard to your word. If, however, you do not wish to work yourselves, *give permission to the men to take ore from the mines, because I will not be responsible for the evil consequences resulting among people without employment.*

"Independence and Reform.

"M. MORA.

"S. DIMAS, *July 10th, 1867.*

"To the Citizen Representatives
of the Tayoltita Mines."

(The foregoing is the translation furnished by the official translator of the Department of State. For the translations which were before the Commission, see *Record*, 54, 124. The sense is substantially the same, and Mr. Tripler, the official translator for the Commission, seems to be justified in the sharp retort which he made to Señor Zamacona in the letter which is printed in the *Record*, 747, 748.)

This threat of July 10th was doubtless one of the things that Exall was brooding over when he said to Garth on the 14th (*Record*, 272):

"The officials are getting *daily* more troublesome; their demands are all *foolish* and VERY UNJUST."

In face of such lawless proceedings as these, on the part of the officers of the law, which were subversive of

the very foundations of property, and therefore of civilized society, the complainant alleges that "the difficulty with the local authorities in June and July occasioned *no inconvenience* to the Company."

The fact that the Company was in the power of such officials made the continuance of its work impossible, and convinced Exall (as he said in his explanatory affidavit of May 1st, 1878, *Record*, 669), "that it was a mere matter of time when they would be driven out, and compelled to abandon and lose all their interests there." This prospect, unfortunately for his reputation, set him to thinking how, through his British friend, Granger, who had become Mexicanized, and was living with Judge Soto's step-daughter, Cecilia, some advantage might be secured for himself when the Mexicans should get hold of the Company's property.

But now it will be shown from the evidence that Exall told the truth when he said, as a witness for the claimant, that the local authorities attempted to make him "employ everybody who would work, or employ no one, which they knew would ruin the Company." (*Record*, 154.)

In his examination before the Senate subcommittee, Elder, a witness for Mexico (one of the witnesses named in the bill who has not been produced by the complainant in this suit), testified as follows:

> "Q. Do you know anything of the troubles that occurred between the superintendent of La Abra mines and the authorities about July, 1867; if so, state what you know in regard to it?—A. Yes, they served a notice on the Company that *they wanted them to work more men; that they wanted them to put more work on the various mines.* (Rep. 2705, Sen., 50th Cong., 2d Sess., 565.)

This, be it remembered, belongs to the "newly-discovered evidence," and corroborates Avalos, one of the Com-

pany's witnesses in the original trial, who testified as to Mora's personal intervention at Tayoltita, as follows:

"At another time—I think in the month of July, 1867, when I was engaged in bringing down from the mines to the hacienda the ore belonging to La Abra Company—I met all the Barreteros, and men employed in and about the mines, going down to the hacienda, and the Barreteros and all the other men stopped and talked with me, and they all said *an order* had been sent up to the mines by Marcos Mora, gefe politico of that district, *to stop work, and ordering them all to Tayoltita.* When I came down to the town, in the evening, the gefe was at the house of Guadalupe Soto, and I heard the gefe, Marcos Mora, tell these men, a very large crowd of them, that the Company did not work as he, the gefe, wanted them to work, *and employ all the men who were out of work at Tayoltita,* and that *he would not let any of them work if they did not employ all of them, and work all their mines at the same time, as he had directed them to work;* and he said at the same time, that *he was going to take the mines away from the Company and give them to all of the people, to work them as they pleased;* and that night, I remember well, I did not sleep at all, for the words used by the gefe politico to the crowd of miners were well intended, and had the effect, to incite the Mexican miners and men out of employment to riot, *and perhaps to something much worse than that,* and I expected serious trouble that night for the Company.

"I do not know how the Company settled the matter, or how it was that 'La Abra Company' stayed in the district as long as they did after that affair, for I knew the authorities were determined to get rid of them, from all I could hear whispered about *by Mexicans out of employment, who seemed to be in with the gefe and juez in getting the Company out.* I know these troubles went on from time to time until the spring of the year 1868, when the superintendent, Exall, abandoned all the mines and the hacienda and metals and stamp mill and everything

> they had there, and the Company has never been there or done any work in San Dimas district since that time." (*Record*, 52.)

Avalos is the witness to whose honesty, fidelity, and intelligence Captain Dahlgren testified so strongly in the Senate investigation, saying that after years of service and intimate association, he "never knew him to steal a sixpence or to lie." (Rep. 2705, Sen., 50th Cong., 2d Sess., 667, 711.) It should be also noted that Avalos' *second* deposition for the Company, repudiating an alleged deposition which the Mexican authorities had forwarded as his to the Commission, was witnessed by his employer, this same Dahlgren, and by H. Diaz Pena. (*Record*, 95.)

Mr. Ralph Martin, a man of means and high character, who succeeded Mr. Rice as superintendent of the Durango's Company's establishment at San Dimas, said of Avalos (*Record*, 165):

> "He was an honest, reliable man, *of good character for truth.* He was regarded there, as I believe, by all who knew him, as an honest, industrious and *reliable* man."

Chavarria, an eminent Mexican lawyer, of Durango, *who accompanied Mora on that visit of his to Tayoltita*, says (*Record*, 81, 82):

> "That in July or August of 1867, the year referred to in the question, he was at San Dimas on private business, and also at Tayoltita, as he has before said; that he went to the mines for the purpose of seeing them, and that *he conversed with the gefe politico upon their condition;* that in consequence of these he became satisfied that both *that officer* and the *mining people* were strongly bent on *annoying and driving the Abra Company away*, and with which they were *continually provoking quarrels: that officer* and some of the workmen stated that *they*

believed the Company to be annexationists; that it was therefore hateful to Mexico, and they thought it best to drive it away from that mineral, anyhow; that, for this purpose, the authorities instigated the laboring people, on the pretext of their wants, not to work for the Company; that he further knew that the Company's ores were frequently stolen, and that it was not legally protected by the Gefetura, where the superintendent usually made fruitless complaints of the thefts; that that officer (the gefe) also gave him, deponent, to understand that *he had a special interest in the expulsion and despoliation of the Company, in which case he intended to denounce the mines at Tayoltita,* and he offered deponent a share in them, which deponent refused, and reproved his conduct in permitting the operatives to steal the ores, which they did with impunity, to the great responsibility of the authorities of that department, who, either by their connivance, or indolence, compromised the honor and good name of the Republic. * * *

"11th. State whether Marcos Mora, the gefe politico, was visited on the second night of their stay at Tayoltita, in July or August of 1867, at the house where they were stopping, by any of the employés of the Abra Company, or any of the head Mexican workmen who had been in the employ of the Company. Also state all that then and there took place between the said employés and the gefe, Mora, as to their continuing in the Company's service; state what the parties named did and said in your presence.

"Ans. That all the matters referred to in the question are true; that the greatest disorder prevailed upon that occasion; that *the head miners, by order of Marcos Mora,* mutinied against the Abra Company and the superintendent; they refused to work any longer in the mines, which resulted in the continuance and increase of the robbery of the ores, which was openly carried on in daylight and in the the presence of the superintendent." (*Record,* 81, 82.)

Mora's order and letter should be interpreted in the light of his avowed hostility to the Company, which is proved by many witnesses, among whom is one for whose respectability, regard for truth and courage in declaring it, complainant's counsel has vouched so eloquently, Juan Castillo del Valle, from whose second deposition we make the following extract:

> "11th. State whether you have heard it publicly reported that Marcos Mora, who was gefe politico at San Dimas in 1866 or 1867, was strongly prejudiced against La Abra Silver Mining Company and Guadalupe Silver Mining Company, and endeavored to drive them out of the country, and whether Macario Olvera, who was gefe politico in the same district in 1868, was of the same way of thinking?
>
> "Ans. He answers this question in the affirmative, so far as relates to Marcos Mora, as he *knows* that he was very badly disposed towards the Company in question; that he even went so far *as to say to the deponent that it was necessary to break these companies up and drive them away from there.*" (*Record*, 78.)

The following is from *Soto's* examination by the Mexican government (*Record*, 129):

> "Question. When you were judge at Tayoltita in 1867, did you direct and issue the communications dated respectively the 5th and 4th of July (June), copies of which have been shown to you and which appear on page 6 of these proceedings, he *replied* that he is certain of having issued such communications to the administrator of the 'Abra' establishment, and that he did so because there had been *a rising of the people to compel him to.*"

Not complaints, be it noticed, of the comparatively few miners who were working in the Company's mines, but "*a rising of the people*"—the unemployed population of which Exall spoke.

This important fact was brought out again by Judge Soto as follows (*Record*, 129):

> "On this deposition being read to him he added that the communications which he issued were in consequence of the fact that besides the disturbance on the part of the people, he had received orders to that effect from the political chief, Marcos Mora; all in consequence of the failure of the superintendent *to contract with the operatives for working the mines.*"

Shortly after these orders of June 3, 4, and 5 were issued, Exall wrote two letters to Garth on June 11 at Mazatlan, one a short note by a friend who was *en route* for New York, and the other "more fully by steamer." (*Record*, 267.) In his letter of July 20 to Exall, Garth acknowledged receipt of Exall's letter "of the 11th by private hand" (*Record*, 285; *ib.*, 321), and on the 10th of August (*ib.*, 286), said that he had written briefly on the 20th ulto., and *since* had received Exall's favor of the 11th of June from Mazatlan. If that letter, which undoubtedly gave an account of Mora's and Soto's orders of the week previous, was copied, as usual, on separate sheets at the port, and if the copy was pasted into the press-copy book *it has been abstracted;* and if no copy was inserted, then we have another remarkable proof of the material defects of the press-copy book as a record. But it is too much to believe in so many coincidences—the repeated disappearances of letters favorable to the Company's case from the book that was in Granger's possession after he made his contract with Gaona.

Nor can it be regarded as another mere coincidence that in Garth's reply to that missing letter (*Record*, 286), he speaks of reports in the newspapers that—

> "Americans and all foreigners will not be protected in their *persons* and *rights* in that country,

> and that *we may have to abandon our property there.* If so, you must take all necessary and legal measures, by protest and otherwise, to secure our claim against the Government."

Exall did more than protest. He did what the Department of State would have instructed him to do. He appealed, and so did Mr. Rice, acting for the Company, to the higher authorities against those illegal and tyrannical interferences, as found by the Umpire, and as will be shown from the evidence in another part of this brief.

But the most remarkable statement in this letter of Mr. Garth's is the following:

> "The directors of the Company are trying to reorganize and to raise money to pay off the debts, and to prosecute the work anew if possible, but, I am constrained to say, with but little hope of success."

Mr. Garth was not the man to obtain money on false pretenses, nor to conceal material facts from anybody he might ask to join him in a venture. The fact that the property rights of foreigners could be so arbitrarily invaded by officers of the law as were the Company's property rights by Moro's and Soto's orders was a deathblow to the idea of raising further capital. Nothing is so sensitive as capital—not even human vanity. In that remarkable letter of Mr. Foster's in regard to the condidition of Mexico, already cited in this argument, he says:

> "Murder and personal outrage are bad enough, but while it may appear strange, it is nevertheless true that *capital and property are more sensitive to protection than life itself.* A man will often risk his person where he will not take his money or effects." (For. Rels., 1878, p. 650.)

Who would send more money to a place where the

local magistrate could issue an order, on written instructions from his superior, that—

> "If the work of the Abra Company is not to be continued according to the system of one-third as heretofore, *you are to vacate the mines at once*, so that the miners may continue to work *for their own account and may lose no more time?*"

In Soto's second order it was left for the miners to determine whether the Company should be ejected from its mines and all its costly improvements rendered useless or not.

> "Wherefore, this court notifies you that you are to make a suitable arrangement with the miners, as regards their work, within two hours, and IF THEY DO NOT AGREE THERETO, *you are to vacate the mines in order* that THE AFORESAID MINERS *may lose no more time.*"

It was the provision for the "denouncement" of mines in the law as it then stood (a provision now abolished) that induced these combinations between corrupt officials and ignorant and prejudiced laborers to drive the foreign mine owners out.

La Abra Company had a right to stay and protect its property and await developments, no matter how few men it employed or how little money it spent, so long as it did not violate the law, and if it violated the law, there were legal means of redress that could be employed against it.

The Durango Company at San Dimas was protected because Mexican officials were pecuniarily interested in its success. Its superintendent, Mr. Ralph Martin, who succeeded Mr. Rice in 1868, testified to that fact as follows (*Record*, 164):

> "There was, in reality, no protection given to foreigners in that country, and I never knew any

effort to be made by the authorities there to extend protection to Americans, *excepting only in cases where the profits of the mining enterprise were shared by said authorities.*"

See, also, Mr. Birmingham's testimony (*Record*, 738, 739).

The success that might have been achieved by La Abra Company if it had been protected and had carried out its idea of tunnelling its mines, is indicated in the following stipulation between counsel for the parties in this suit: *

"It is hereby stipulated and agreed between counsel for the parties in this cause that if Mark Birmingham, who has been examined in behalf of the respondent Company, were recalled, he would testify substantially as follows:

"That he answered, or intended to answer, the eighth interrogatory propounded to him on his former examination in the affirmative, and now answers it affirmatively.

"That the Candelaria mines at San Dimas were operated from 1863 to 1887, by the various companies which owned them, at a loss; that during these years the work of tunnelling the mines was in progress with various intermissions; that the ore beds below the old workings were finally reached in 1887 or 1888; that when these bodies of new ore were in sight, and while the mines were being worked on a large scale, they were denounced by the superintendent for himself, as abandoned, and the denouncement was allowed by the proper legal authority at San Dimas; that this officer was removed by the federal authorities of Mexico for fraud and collusion in that transaction; that a suit for the possession of said mines is now pending against the said denouncer at San Dimas, in which suit the said

* By inadvertence this stipulation was not included in the *Record*, but it is printed here by consent.

Birmingham's Company is plaintiff; that the mines are now worked night and day by electricity, and are producing, and for some years have produced, from $100,000 to $200,000 net profit per month.

"WM. A. MAURY,
"*Special Asst. to Atty. Genl.*
"WASHINGTON, D. C.,
"*May 7, 1896.*"

As late as October, 1867 (before the Guadalupe hacienda was seized by Soto or Exall was imprisoned) Sloan was at Tayoltita "awaiting news from the Company, expecting that they *might decide to run the tunnel.*" (*Record*, 274.)

The next specification in this paragraph of the bill is:

(9) "That the superintendent was *not imprisoned*, but was only told to consider himself in arrest (at his own hacienda) for alleged contemptuous treatment of a judge, and that he straightway complained to the Prefect, *after which no further restraint was imposed upon him.*" (*Record*, 16.)

In his opinion on the Company's claim, the Mexican Commissioner, Zamacona, made the following admission (Ex. Doc. No. 103, H. R., 48th Cong., 1st sess., p. 40):

"It is proved by the statement of *four unimpeachable witnesses* that the imprisonment in question, which only lasted *four days*, was imposed by Judge Nicanor Perez for an offense committed against his authority."

One of the local magistrates, Nicanor Perez, went to the Company's hacienda on January 7, 1868, and, without permission, entered the Company's private storeroom to speak to one of the Company's employés, whereupon Mr. Exall, who was behind the counter in the Company's store, requested him to come out of the private storeroom, as "no one was ever allowed in there without permission."

Perez felt insulted, and on returning to his house sent

an order for Exall to appear before him. What followed on Exall's appearance is detailed in his letter of January 7, 1868, to the prefect at San Dimas. (*Record*, 280.)

The Government's persistence in the assumption that this letter could possibly tell what happened to him on January 8 is most surprising. His appeal to the prefect did not and could not possibly deal with events that had not yet occurred.

His imprisonment in the pest house at Raventon was not imposed and did not commence until the next day, doubtless because Perez had meanwhile communicated with the prefect (Olvera), and had received an intimation that he could wreak his vengeance on Exall for the fancied insult at the hacienda.* In his appeal to the prefect Exall said (*Record*, 281):

> "*Dn. Nicanor intends writing to San Dimas, and will of course give his version of the affair.*"

The abuse and public humiliation to which Exall had already been subjected appear in the earlier part of this appeal of his to the prefect. Judge Perez "*had collected round his house*" (this, be it remembered, is part of "the newly-discovered evidence," *the "tell-tale letter-book"*) "*a number of men, and in the house preparations had been made as if resistance was expected and force might be required.*" At Exall's request Mr. Sloan, one of the Company's employees, who understood Spanish, acted as interpreter, and explained that in requesting him to come out of the storeroom Exall "had no intention of insulting him or *hurting his feelings*, but was simply *enforcing the rules of the hacienda in not permitting any one to go in the storeroom without permission.*"

---

*Olvera's predecessor, *Mora*, testified that "the judge, Nicanor Perez, told him at the time that he had imprisoned Superintendent Charles Exall because he had personally insulted him, and that in revenge he had fined and imprisoned him." (*Record*, 87.)

"This he would not listen to, and persisted in saying that I intended to insult him. I, of course, did not, and, from my ignorance of the language, *could* not argue the point. After some time spent in talking to this effect, I asked him if he had gotten through with me, as I desired to return to the hacienda. He replied, yes, he had finished. Mr. Slone and I then left, and bid him good-bye. As we reached the corridor he said *he never wanted to see me in his house* except on official business. To this I replied, 'Very well, sir,' and turned to leave. He called me back, saying *not to go;* if I did, *he would send a force after me and they would shoot, and insisted on my return into the house. I did so without any remark. He then said I was his prisoner.* I then requested him to know what was to be done. *He said he would put me in jail until he could receive instructions from San Dimas.* I remained passive, and *he then gave full license to his tongue, abusing me in the most violent language.* Then and several times I repeated my statement of the occurrence in the store. To this he paid no attention, and treated me with utter contempt, and persisted in his intention of *putting me in jail until he could hear from San Dimas,* and would listen to nothing that I might say. After being his prisoner for an hour, not being allowed to speak to any one and *being guarded,* I asked if he intended putting me in jail please to do so, as I had a headache and wished to lie down. He then gave me permission to go to the hacienda, but to consider myself still his prisoner and (to be) at his house *whenever ordered.* * * * *But for being a prisoner, I would come and see you in reference to the matter, but unfortunately necessity compels me to write.*" (*Record,* 280, 281.)

This shows conclusively that *the incident was not closed,* and that there would be a sequel. And it was his fear of what the sequel would be that made Exall appeal to the Prefect to "*please act on this immediately.*"

He was writing to the same hostile official, the Prefect

Olvera, who, to give Judge Soto more time when he seized the Company's Guadalupe hacienda a month or two before, had sent the papers to Durango, instead of ordering the Judge to restore possession immediately to the owners. Again Olvera refused to intervene, and next day Judge Perez used his chance, by an abuse of judicial power, to "get even" with the Company's superintendent for a fancied insult and show the miners how a Mexican judge could treat a citizen of the United States.

In Granger's second examination by the Mexican Government (October 6, 1871), when his Mexican friend and partner, Francisco Torres, was working La Luz and Rosario, and was in possession of the Company's hacienda, he still insisted that Exall had been *imprisoned* and *fined*, although in other important respects he modified or contradicted the deposition he had made on behalf of the Company on May 14th in the previous year. His testimony on this point, *as a witness for Mexico*, was as follows (*Record*, 119):

> "That he knows the superintendent to have been *imprisoned* and FINED, *without informing him of the crime for which he was held, and without giving him a trial;* that he (the superintendent) did not wish people to enter the warehouses (bodegas) of the Company without permission from him, was the *cause* of the imprisonment of the superintendent, *the judge having entered them before,* and afterwards the said judge ordered the superintendent to be called, when *he imprisoned him in a small house at a place called the 'Raventon,'* situated in the same district of Tayoltita.
>
> "That, in answer to the question whether he knows that the superintendent asked protection or not from the civil and military authorities of Durango and Sinaloa, and that these denied it to him, he said *that he is aware that he presented himself before the civil authorities of Durango,* but does not know what answer he might have received."

This place, "Raventon," is referred to in Col. De Lagnel's testimony, and appears to have been some considerable distance from the Company's hacienda, although in the same district of Tayoltita. (*Record*, 609, top of page.)

Sloane, who was with Exall when he was haled before Judge Perez, was examined as a witness for *the Mexican government* at San Dimas, October 9, 1871, before Judge Quiros, in regard to Exall's imprisonment, and testified (*Record*, 120):

> "That he *knew* he had been *a prisoner in the jail*, and that * * * from what he saw of the affair it was because the judge went into the hacienda to speak to one of the peons who was at work there, and the superintendent thereupon put him out, from which it resulted that the said judge immediately went to his house and ordered the superintendent to be called before him, when he sent him to *prison*."

The "prison" was "an old uninhabited house that was said to have been occupied by diseased persons;" it was infested with "millions of fleas," "had a most disgusting smell," and was "filthy beyond description." Cryder, an eye-witness, from whose testimony this description is taken, added (*Record*, 69):

> "It was said by the people there that this old house had been but recently occupied by persons of *loathsome diseases*, and that *the judge knew this fact when he sent Mr. Exall there*."

In his letter of instructions to Quiros, judge of first instance at San Dimas, who was taking testimony in 1871 and 1872 for the Mexican government, at that place, in opposition to the Company's claim, the Federal district

attorney, Hernandez, said, under date of May 16, 1872 (*Record*, 122):

> "In the identical inquiry instituted before you, Granger and A. Sloane stated that the superintendent of the Company had been imprisoned by the judge of Tayoltita, and it will be necessary for you to extend the investigation in order to ascertain the *name* of that superintendent; how *long* he remained a prisoner; *who* was the magistrate that caused the arrest, and *what was the result of the appeals which the complainant may have addressed to the superior authorities of the State.*"

Why did they not examine the Governor? Hernandez sent fresh instructions later (July 8, 1872), the eighth point of which he stated as follows (*Record*, 124):

> "It is alleged that Mr. Exall, superintendent of this Company, was imprisoned at the mines; you will be pleased to find out if, in that tribunal, or the bureau of the supreme civil authority, *there is any notice or record of such arrest, and of the reasons which caused it.*"

Under these instructions one Refugio Fonseca, who is described in the translation of the report of his examination (*Record*, 128) as "the person who was in the service of the Abra Company of Tayoltita, and that, therefore, he must be able to give a circumstantial account of what took place on the occasion of the arrest of the superintendent of that establishment," was examined as follows (*ib.*, 128):

> "Do you know what was the name of the superintendent of the Abra; if he was arrested by the magistrate, judge of Tayoltita; how long he was imprisoned; what magistrate ordered the arrest; and what was the result of the superintendent's application to the superior authorities?
>
> "He replied that as a servant of the aforesaid Company he knew the superintendent about whom he is questioned, whose name was Carlos H. Exall;

that he was arrested by Judge Nicanor Perez in consequence of some misdemeanors that the former had committed because he went to his house (he does not know on what business); that he *was imprisoned for three days*, and that he does not know whether said Carlos had made any application to the authorities of the State."

It is to be remembered that this testimony was taken more than four years after the event, and it is evident that the translations from the Spanish are not always as clear as they might be.

Granger was again examined (July 23, 1872) under these instructions of Hernandez, and testified as follows (*Record*, 128, 129):

"That *he was a witness to the arrest*, and that his name was Charles H. Exall; that he was imprisoned for *two or three days* because he reproved Judge Nicanor Perez for having removed from one room to another in the establishment of the Company, and he *knew* that the superintendent *had complained to the Governor of Durango*, but that he does not know with what result."

The following is the response to Señor Hernandez's requisition for any record of Exall's imprisonment existing in the office of the Prefect at San Dimas (*Record*, 136):

"SAN DIMAS, *August 6, 1872.*

"This office having been fully informed of the contents of the foregoing note, I have to inform you in reply that, touching the point alluded to in your note, there does not exist in this office any data, nor any knowledge that the person alluded to has been imprisoned in this mineral district.

"Independence and Liberty.

(Signed) ARCADIO LAVEAGA,
(Gefe Politica).

"SAN DIMAS, *August 6, 1872.*"

It may be that Olvera did not file Exall's appeal or *Perez's order* which Exall had inclosed; and also that *Perez had made no return of the fine of $50 which Granger paid to him for Exall's release.* This payment of $50 was entered as a "*prestamo*" on the Company's books under date of January 8, 1868, in connection with an entry of $3.50 for "*court expenses*" on the 14th of the same month. (*Record*, 743, "Expense account.") This entry is in Exhibit 30, one of the 28 books and papers which were kept in the Company's office at Tayoltita, and abandoned there by Exall in 1868, and delivered by Granger, under his contract with Gaona, to the Mexican Government in January, 1878.

The existence of these entries, made at the time, *ante litem*, confirms the testimony of Exall, Granger, and Cryder in regard to the payment of the *fine*, and affords a partial explanation of the extraordinary fact that while appealing in the name of "honor and justice" to the United States for the return of the undistributed portion of this award, and being, therefore, bound to conduct herself with the most scrupulous propriety and the utmost candor, *Mexico withheld these books and papers from our Government for sixteen years.* During this whole period she fostered the idea that the so-called "newly-discovered evidence" submitted by her in 1878, in aid of her appeal to equity and comity between nations, *contained all the records that had been obtained from the Company's former employé, and was not a mere selection of evidence by the party pecuniarily concerned.*

One of Mexico's witnesses who was examined at San Dimas on October 12, 1872 (Miguel Laveaga), remarked:

> * * * "That *D. Nicanor Perez is here, who is another that ought to know something also, on account of his having lived at Tayoltita at the time.* (*Record*, 143.)

But, although the Federal attorney had been so urgent for proof as to the details of Exall's imprisonment, the Judge who was in charge of the examination (Quiros), and who, according to Dahlgren's deposition, had accepted money and "rations" from Dahlgren in connection with the removal of a part of the Company's machinery (*Record*, 97), *refrained from putting Perez on the stand!* But probably Quiros did not take this responsibility without consulting Hernandez, for they knew that Granger, who was still in the neighborhood, had testified several times as to the facts of the imprisonment and the payment of the fine of $50 imposed by Perez upon Exall, and that Exall had appealed for redress to the Governor of Durango. The Mexican authorities could not examine Perez without proving the Company's case, for, notwithstanding Exall's complaint to the Governor of Durango, *Perez had never been punished or called to account*, either for the prostitution of his functions as Judge to the gratification of personal malice and revenge, or for the disposition of the fine he had extorted from his victim.

Where rights of property and of person could be invaded by their lawful guardians as the Company's rights of property were invaded by Mora and Soto, and as the superintendent's personal liberty was invaded, his life endangered, and his personal and official standing in that half-civilized community ruined by Judge Perez, what was there to do but abandon the enterprise?

The next specification in the XVIth paragraph of the bill (*Record*, 16)—

> (10) "That no redress was denied the officers of the Company, and no wrongs were inflicted upon them"—

is fundamental, and if it were established, as promised, by "the newly-discovered evidence," or by the witnesses

designated in the bill, or if it could be shown from the whole case that such was in very truth the fact, and that *the evidence which led the U. S. Commissioner and the Umpire to a contrary conclusion* was obtained " by fraud effectuated by means of false swearing, or other false and fraudulent practices *on the part of the said La Abra Mining Company, its agents or assigns*," the Government would be entitled under the Act (if it be constitutional) to a decree forever barring the Company from any claim to the undistributed portion of the award.

The Umpire found that the protection of the law had been denied to the Company, and that the officers of the law at San Dimas and Tayoltita were themselves the wrongdoers—

> " That *the local authorities at San Dimas*, far from affording to the claimants that protection and assistance which had been promised them by the Mexican Government, and to which they were entitled by treaty, not only *showed themselves a spirit of bitter hostility to the Company*, but encouraged their countrymen who were employed by the claimants in similar behavior, and even frightened them into refusing to work for their American employers.
>
> "*The conduct of these authorities was such* and the incessant annoyance of and interference with the claimants was so vexatious and unjustifiable, that the Umpire is not surprised that they considered it useless to attempt to carry on their operations, and that for *this reason*, as well as from the well-grounded fear that their lives were in danger, they resolved to abandon the enterprise.
>
> " These facts are not, in the Umpire's opinion, at all refuted or even weakened by the evidence submitted by the defense; on the contrary, he believes that *the local authorities were determined to drive the claimants out of the country.*" (*Record*, 8.)

But for the Umpire to find as matter of law that the Mexican government was responsible to the United

States, under the Convention, for the action of the local authorities, it was necessary that he should be convinced that the claimants had appealed to the superior authorities for protection and redress, and that their appeal had been denied. On this matter of fact the Umpire found:

> "It appears that the superintendent of the mines took such steps as he could to obtain protection from these authorities, and finding his efforts in vain, he appealed, through a lawyer of high character, to the highest authorities in the State, who declined to interfere in the matter. To suppose that when so determined a spirit of hostility on the part of the local authorities (one of whom was the gefe politico, who wielded great power), and so much indifference by the State government were displayed toward the claimant it would have been of any avail to appeal to the courts of justice, would be puerile.
>
> "In short, the Umpire does not see what else, in presence of such opposition to their efforts, the claimants could do but abandon the enterprise." (*Record*, 8, 9.)

Now, in face of these findings, the Attorney General says in the XVIth paragraph of the bill (*Record*, 16):

> "That the said documentary evidence (*i. e.*, the press-copy book and Garth's and Exall's letters) and the said witnesses (Dahlgren, Gamboa, Loaiza, Sundell, Elder, Hermosillo, Somero, and Torres) will enable your orator conclusively to show the facts in the XVth paragraph of this bill alleged, and *also the following*, which your orator says are the facts, to wit: * * * (and here comes the allegation with which we are now dealing)—
>
> "*That no redress was denied the officers of the Company, and no wrongs were inflicted upon them.*"

The Government had thus bound itself to show to the court, from the sources indicated in the bill some proof of the truth of this fundamental allegation.

But, as we have seen, the Government called only two

of these witnesses in this suit, and did not examine either of them on this subject, while the letter-book which it produced shows that Exall appealed to the Prefect at San Dimas for protection against the aggressions of the two local magistrates, Soto and Perez. (*Record*, 278–281.) And Garth's letter of August 10, 1867 (another part of "the newly-discovered evidence") shows that he had instructed Exall to consult with Mr. Rice for the purpose of taking any necessary steps for protection or redress on behalf of the Company. (*Record*, 286.)

Thus the Government declined the attempt to prove this allegation by the documentary evidence or the witnesses designated in the bill, and it proceeded to attack certain portions of the original testimony on which the conclusions of the Umpire were founded. And thus it was made clear to a demonstration that this proceeding was nothing (so far as the complainant is concerned) but an attempt to retry an international claim in a municipal forum on the evidence, and only on the evidence, on which it was tried and determined more than twenty years ago by a court of exclusive and final jurisdiction under the law of nations. But the appellants are ready to consider the case on the evidence that was submitted to the Commission as well as on the evidence taken in this suit.

Chavarria's Testimony.

Let us look at the situation when Chavarria was examined in support of the Company's claim. As to the character of this witness and his testimony on another point, see *supra*, 188 *et seq.*

Tayoltita, where the Company's mines, works, and hacienda were situated, is in the State of Durango, distant from the capital city of Durango about 150 miles. It

was in this capital city, upon petition of the Company's agent, A. W. Adams, dated July 11, 1872, and addressed "to the First Criminal Judge acting in civil proceedings," that Chavarria was examined. His examination was made in the court of which Señor Pedro J. Barraza was judge. Señor Barraza was a distinguished Mexican, as well as a distinguished judge, having with General Vega acted as agent for the Mexican (Liberal) government in this country in the purchase of arms and the promotion of other measures for the Republican cause during the French invasion. (*Record*, 740.) It was by this judge that Mr. Chavarria was cited to appear on the day following the presentation of General Adams' petition, July 12, 1872. (*Record*, 80.)

Chavarria's examination, on the Company's side, followed as it was in a few days by that of the former Prefect, Mora, who was brought into the same court by compulsory process, must have excited a great deal of attention.

Now, upon "the great fundamental question in the case," what did this distinguished witness say? He testified as follows:

> "15th. State whether the protection of the National and State authorities was duly and legally invoked on behalf of the Abra Silver Mining Company, at the end of 1867, to protect it against the unlawful attempts made against it and the robbery of its property by Mexicans at the instigation of the gefe politico of the district and the local authorities at Tayoltita? If this be so, then state how you learned the facts? Who was employed by the Company as its agent, to represent the facts to the authorities? Who was employed and acted as the Company's attorney at the time the said protection was invoked? State what was told him, and what was done in his presence by the National and State authorities when the said protection was asked for, and in reply to his petition?

"Ans. That the matter stated in this question is true in all its parts; that *deponent, employed by Mr. Rice, of California, as Exall's lawyer, repeatedly solicited,* from the *State* government, protection for the Abra Company, to suppress the robberies and outrages which the Company were experiencing at Tayoltita, but all to no purpose, as, after innumerable steps and measures, *the Executive of the State never even so much as requested the authorities at San Dimas to comply with their duties.* The only answer given was, that the government of the State, at whose head was Francisco Ortez de Zarate, in 1867, would not meddle in private matters.

"16th. State whether it is publicly well known to the authorities and the people of this city and other parts of the State that the Abra Silver Mining Company was compelled to abandon their mines and mining operations at Tayoltita in the month of March, 1868, by reason of the acts of the national and local authorities of Mexico? State, also, *if the Executive of the State had the power to prevent such acts, and whether he refused to exert such power for the purpose?*

"Ans. That the matter contained in the question is true, and which he knows, because it was publicly well known that the Abra Company abandoned their mines at Tayoltita in March of 1868; that he also knows that *the Executive of the State had the military and civil power requisite to have prevented and protected that Company from being violently expelled; the deponent is unable to explain the reasons why this protection was withheld.*

"17th. State whether you know, or ever heard it said, that the Company, or any of its American employees were, ever guilty of any illegal acts, or of disobedience to the laws, during the time that they were working the said mines, or during their residence in Mexico? State whether you know of any valid reason, or excuse, why the due and lawful protection was denied by the Mexican authorities, such protection, you say, having been duly invoked by the Company?

"Ans. That he knows of no unlawful act having been committed by or (justly) imputed to the Company, or any of its American employees, during the time of their residence in Mexico; on the contrary, he knows that their conduct, both in private and in public, was good, and consequently he does not know by what lawful reason the Mexican authorities withheld from them the protection to which they were entitled." (*Record*, 82, 83.)

In his letter of August 10, 1867, included in the "newly-discovered" evidence, Mr. Garth had instructed Mr. Exall to take all necessary and legal measures by protest and otherwise for the protection of the Company's rights, and had added: "Mr. Rice no doubt will be of essential service to you in any measure of this sort, and we would advise you to consult freely with him." (*Record*, 286.)

This corroborates Chavarria's statement, *supra*, that he was employed by Mr. Rice as Exall's lawyer. In the first part of his testimony, from which we have already quoted (*supra*, 190 *et seq.*), Señor Chavarria described what he himself had seen and heard at Tayoltita when he was there with the Prefect in July or August, 1867—words and deeds of that official that would seem incredible were it not for the revelations made by the diplomatic and consular correspondence published in our "Foreign Relations" in regard to the official corruption and hatred of foreigners prevalent in Mexico prior and subsequent to that time.

When Chavarria testified in court at Durango, Mora and Soto's written orders were on file in the claimant's case, and copies had been sent, with instructions to examine Mora, to the court of first instance at San Dimas, by the Federal District Attorney, Señor Hernandez, who was himself at Durango.

Now, why did not the Mexican authorities examine Chavarria as soon after he testified for the Company as possible? They did not file their evidence with the Commission at Washington until October, 1873—*more than a year after Chavarria's examination at Durango*, and they continued taking testimony at San Dimas until October, 1872.

If Chavarria perjured himself and if he was suborned by the Company (for these two things must be proved) why was he not arrested and tried at the time? Or, if not then, or some time during the four years that intervened before the motion for a rehearing was denied by the Umpire, why was he not arrested and tried as soon as the scathing words in which the Umpire denied the motion were known in Mexico? (See the Umpire's remarks, *supra*, 128.)

The most damaging testimony in the case against Mexico was given by two distinguished Mexicans, C. F. Galan * (*Record*, 187) and Jesus Chavarria (*ib.*, 80–84.) The United States should never have listened to Mexico's protests against the award in this case, grounded as those protests were upon the alleged perjury of the witnesses for the Company, till these distinguished Mexican citizens (whose testimony, if not disproved, justified the award) had been fairly tried and convicted of perjury.

There was no bar, as we have seen, to the trial of Chavarria or Galan for perjury. (*Supra*, 208; *Record*, 595, 596.)

The reason why Chavarria was not examined by the Mexican authorities, as Del Valle, Granger, and Avalos were after they had testified for the Company, was doubtless twofold—because, in the first place, it was to be

* As to Galan's prominence, see *supra*, 187.

feared that he would have given further particulars and strengthened the case against Mexico, and because, in the second place, there was already in the case evidence of the fact that Exall, in his own proper person, as well as through Rice and Chavarria, had appealed to the State authorities for protection and redress.

Chavarria Corroborated by Granger and Mora.

This fact was *twice* brought out by the Mexican government (*i. e.*, in its second and third examinations of Granger in connection with Exall's imprisonment in the pest house).

Granger said (*Record*, 119):

> "He *knew* that the superintendent *had complained to the Governor of Durango*, but that he does not know with what result."

And he repeated the statement in his re-examination before Judge Quiros. (*Ib.*, 129.)

But Chavarria's testimony had also been corroborated in many important particulars by the Prefect, Mora, himself—a witness who, like Perez, knew so well why it was that the Company could not continue its work or retain its property at Tayoltita, that the Mexican authorities were afraid to examine him.

On the 8th of July, 1872, the Federal District Attorney, Hernandez, wrote to the judge of first instance at San Dimas, before whom the examination of witnesses on behalf of the Mexican Government, in opposition to La Abra Company's claim, had been proceeding for over a year, and stated to him (*Record*, 123):

> "It is of *great importance* that C. Marcos Mora, who was the judicial authority of that district, and

Guadalupe Soto, who was judge at Tayoltita, *be examined*," &c., &c.

On the 15th of July, 1872, the San Dimas judge (Quiros) certified that "as to *Mora* and Avalos, their place of residence is not known."

Quiros, who had refrained from examining Perez, also refrained from examining Mora, or making diligent inquiries as to his whereabouts.

Mora had settled at Durango, and, upon General Adams' petition, was examined on behalf of the Company (in the manner permitted for the examination of a hostile witness) within eight days from the time when Quiros certified that his place of residence was not known. Hernandez should have known (and perhaps he did know) that Mora was in Durango. But it may have been supposed that the judge's certificate that his residence was not known would be an adequate excuse for letting him go—as Perez went—unexamined. Before quoting what Mora said on the fundamental part of the case now under consideration, it may be well to quote what he said about Quiros, inasmuch as it may explain why that official showed so little interest in having him examined. After testifying that his predecessor as Prefect at San Dimas in 1867 was Ignacio Quiros, and that this Quiros was then (July 23, 1872) "judge of first instance in that department, and that *the general and common feeling in that town was adverse to the Americans*," he said (*Record*, 87):

> "That although he did not know the persons referred to in the question (Quiros and Laveaga) previous to becoming gefe politico, he afterward became perfectly acquainted with them, and *knows that they were unfriendly to the Company, 'La Abra,'* and toward the other Americans residing in the department; *that neither of them were satisfied with the*

laws given by President Juarez inviting foreigners to come to the country, and although those persons might have obeyed them, it was against their own wishes; that they not only showed their unwillingness to do so, *but in various ways tried to molest them and force them to leave the place.*"

Mora also testified (*Record*, 88)—

"That he did hear it stated that during Olvera's time that the Mexican operatives, who were absolutely without work to maintain themselves, stole some of the Company's ores, and that *neither Quiros nor Olvera* would listen to any complaints made on account of the said robberies by the Company's superintendent."

It will be recollected that the Mexican government and Mr. Attorney General have shown by the testimony of Colonel De Lagnel that hostility to the United States was not a sentiment of which the Mexicans who entertained it were ashamed. The words of De Lagnel's young friend and employee were significant (*supra*):

"*We hate them.* * * * *It was taught us by our fathers.* They have *told us all*, and they KEEP AT IT."

The following is from Mora's examination, in his answer to the thirtieth question (*Record*, 89):

"That Lawyer Chavarria informed him that the Abra Mining Company, at the time referred to in the question, employed him and Mr. Rice, the former as lawyer and the latter as attorney in fact of the Company, *to make a complaint to the governor, General Francisco Ortez de Zarate, of the damages and persecution which the Company were experiencing at San Dimas, and asking him for protection;* that, at the time, *the governor sent for deponent*, and questioned him with regard to the Company; that the deponent informed him that it consisted of *Americans*,

and, like all other foreigners, *was working for the ruin of Mexico;* HE REFUSED IT THE PROTECTION WHICH IT PRAYED FOR."

It has already appeared that the second part of this specification—that "no wrongs were inflicted upon them" (the officers of the Company)—is in no way supported by the newly-discovered evidence or by the witnesses designated in the bill; but, on the contrary, that the Government has proved by De Lagnel the levying of illegal exactions upon the Company's trains and their detention, to the great loss and damage of the Company, and also the hostility of the local magistrate, Soto, and of the people in general to the Company, its officers and operations.

Proofs of the Company's Injuries.

In the course of this discussion of the facts, one subject has run into another, and although the burden of proving the Company's alleged fraud in obtaining the award is on the Government, the affirmative side of the Company's case has unavoidably been developed, and we have seen, as we have gone along, the honesty and strength of the original claim—the proofs of the seizures and detentions of the Company's trains, the loss and embarrassment arising from this cause, and the "tribute" or "prestamos" exacted for their release; the robbery of Scotty; the murder of Grove; the disappearance and supposed murder of another train captain; the hostility of the local magistrates; their orders of dispossession issued in June and July, 1867; their attempts to make the superintendent employ the unemployed population; the seizure of the lower hacienda by Soto, pending his fraudulent attempt at "denouncement;" the collusion of Perez and Olvera in this unlawful disseizin; the fruit-

less appeals to the State authorities for protection and redress; the illegal and arbitrary arrest of the superintendent; his imprisonment in the pest house; the exaction of a fine for his release; and the failure to punish the judicial wrongdoer, or even to call him to account, although he had appropriated the fine to his own use. This exemption from punishment or restraint encouraged the local authorities in their wickedness, and made them feel that they had the sympathy of their official superiors and the power of the State behind them. So we find, from Granger's deposition, that within a month after Exall was released from the pest house, Perez again abused and humiliated him before the mining population (*Record*, 48):

> "A few weeks after this occurrence, on a Saturday, the superintendent (Exall) received from the said Judge Perez an order directing him to attend at his juez-gado (court room), and the same evening, at seven o'clock, Mr. Exall, in obedience to said order, went to the court room, *where he found assembled a large number of the employees of La Abra Company's mines and others*, and, in *their presence*, the said judge proceeded to lecture said Exall upon the manner in which the business of said Company should be carried on, and he threatened that if the superintendent or Company did not work in the mode and manner to please the authorities they should be *deprived of their property and forced to flee the country; all of which was said in my hearing*, and although I have only stated a few circumstances that came under my direct observation, showing the animus of the authorities and people of this district, these are not by any means to be taken as all that took place. It was the daily and almost hourly annoyances and interruptions. Every pretext that could by any means be made the basis of a suit or exaction was availed of."

Threats against the Company seem to have been made as openly by the authorities at San Dimas as at Tayoltita. Alfred A. Green,* who was interested in the San Luis mine, and lived in the San Dimas district, near Tayoltita, from the beginning to the end of the year 1868, testified as to these threats as follows (*Record*, 35):

"In January, 1868, at San Dimas, I heard some Mexican citizens, in the presence of the 'juez' (Quiros)

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*It may be as well to notice here how Green came to be a witness for the Company. He called on Mr. Garth at his office in New York, late in 1869, and reminded him that he had met him in Mexico in 1865. What followed is thus told by Mr. Garth (*Record*, 709):

"Green stated to me that he knew all the conditions that existed at Tayoltita, for he lived in that neighborhood, and knew all the people and knew all the roads (*sic*), and that he was a miner there, and understood their language, and *knew the facts;* that he knew that Exall had been *interfered with and driven off by their officials, and that his life was in danger by remaining there very long.*

"Q. Do I understand you had no previous communication with Green?—A. None whatever.

"Q. And that it was entirely of his own accord and very unexpectedly to you that he came to your office?—A. I was greatly surprised. * * *

"Q. How came that deposition (Green's) to be taken?—A. *Knowing what Green had said, and believing it to be true, I introduced him to the Company's agent, and he volunteered to give this deposition, which was taken in New York.*

"Q. Who at that time was attending to the matter of evidence in support of the claim?—A. A Mr. Adams.

"Q. Give his full name, if you can.—A. Alonzo Adams, I think.

"Q. Was he the man known in the case as General Adams?—A. Yes, sir. I think his name is Alonzo, although I am not certain about that; but he was known as General Adams.

"Q. Did I understand you to say that you introduced Mr. Green to General Adams?—A. I did. General Adams came in probably while I was talking to Mr. Green, and I introduced him to Mr. Green. They were together for hours.

"Q. Do you know whether Mr. Green had ever seen Adams before that time?—A. I know he had not; at least Adams said he had not, and Green said he had not. I know they had never met.

"Q. *Your introduction was their first acquaintance?*—A. *So I believe.*

declare that *they would kill or drive away all the men of that Company*, and the threat was *applauded by the 'juez.'* * * * In my hearing, some Mexican authorities said they intended to *drive out all the American mining Companies, as they had done with the 'Candelero Company,' and get their mines and property;* they were local authorities at San Dimas; amongst the number, I heard the acting Prefect (Olvera) and judge of the first instance (Quiros) say so.

* * * * * *

"After the expulsion of La Abra Company which I have mentioned, in March, 1868, Mexicans were engaged in carrying off its ores, and *it would have been impossible for the Company to have returned and continued its mining operations. Any persistent attempt to do so, I am sure, would have only resulted in the killing of the superintendent and his officers.*" (*Record*, 36.)

John Cole, an unimpeached and unimpeachable witness, after testifying that he had frequently seen the Mexicans packing off "said ores from the works of said Company in sacks upon mule backs, in March, April, and May, 1868," testified that—

"The Prefect of San Dimas, Macario Olvera, *told deponent* that the said Company were *compelled* to leave there in the spring of 1865, and that *if they came back* he, the said Prefect, *would have them driven off again.*" (*Record*, 57.)

John P. Cryder (a witness who has seriously hurt himself in the estimation of the Government's counsel by telling of the millions of fleas and the filth that he saw when he visited Exall in the pest house at Tayoltita) tells also of the continued threats and hostility against Exall, on the part of the local authorities, which might have been curbed if the governor had interfered. After stating that he spoke and understood the Spanish language well, and that he heard Soto say in the winter of 1868 that "he

was in favor of driving said La Abra Company out of Mexico, and all the rest of the Gringo Companies," Cryder testified as follows:

> "I heard said local judge, Nicanor Perez, say he would 'run that La Abra Silver Mining Company out of Mexico.' He said that 'the mines of Mexico belonged to the Mexicans,' and that his government had no right to permit the 'Gringos,' as he called Americans, to 'come here and carry off all the best of their metals,' and that 'the people,' he said, 'would take care that the ores of La Abra mine don't go away in the hands of these Gringos,' and he, the judge, Nicanor Perez would see that the people of Mexico shall have the benefit of these locos' ('fools') investments.
>
> "I recollect that his remarks were made in a prejudiced and determined manner, and in the form of a threat that he would encourage any act, if necessary, to carry his point against that Company, and I so understood it and communicated the facts to some of the American employees there. This was in February, 1868. *I afterwards told Mr. Exall of the threats of the juez.*" (*Record*, 69.)

Perez had injured Exall, and hated him. Exall had been in Perez's prison, and feared him.

Cryder testified further:

> "I also heard Macario Olvera, the Prefect or gefe politico of the district of San Dimas at that time, *February or March*, 1868, say that 'La Abra Silver Mining Company could not stay in that district;' that 'it would be impossible for them to do so.' This was at San Dimas; he did not say positively what course he would pursue, but he said *the authorities were determined to get rid of that Company*, and they could not stay there and work those mines; he said it would be better for that Company to give up their mines and leave the country 'before any accident should happen,' for which, he said, 'the Prefect would not be responsible.'

"I asked him what he meant by the use of the word 'accident' in that conversation, and he made an evasive reply, which satisfied me that mischief was meant, either by the Prefect himself, or by the people or local authorities, with the acquiescence of said Prefect. This said Macario Olvera was, at the time this conversation took place, February or March, 1868, the official and acting Prefect of that district. He was called 'Gefe Politico.' The 'Gefe Politico' of the district, in any part of Mexico, is the chief authority, civil, military and political. I know a man must possess great nerve if he dares to oppose the will of the 'Gefe Politico' in any district of this country. The intimations of difficulties or 'accidents' made by said 'Gefe Politico' against La Abra Silver Mining Company were made in the presence of two or three Mexicans, who evinced immediate approval of said remarks, and considerable of feeling. My suspicions were at once aroused that Superintendant Exall might be in great danger, and that other 'accidents' might happen, and *I told Mr. Exall the first time I saw him after this conversation I have related with said Prefect.*" (*Record*, 69, 70.)

Cryder and Green had both become domiciled in Mexico and identified with the country, and they spoke the language fluently. Green had been a field officer in the Mexican army, and subsequently Commissioner of Immigration for the States of Sinaloa and Durango, and, as such, had invited and induced emigration, both agricultural and mining, from this country to Mexico, under official promise of protection. Cryder, at the time he gave his testimony, resided and had a ranch at Limon, in the district of San Ignacio, and State of Sinaloa. They both were within easy reach of the Mexican authorities, and could have been re-examined while the Commission was in session, or tried for perjury subsequently if the Mexican Government had believed that they had perjured themselves as witnesses for the Company.

Green was employed by Slaughter, under his contract of March 29, 1877, with the Mexican Government, and was at Mazatlan on Slaughter's business shortly thereafter, while Gaona and Granger were negotiating for the Company's books and papers, and might at least have been re-examined, if not tried for perjury at that time, if he had not been so confidentially employed on the Mexican side of this case.

Loiaza, one of the Mexican witnesses who testified on behalf of the Company, said (*Record*, 72):

> "I heard Marcus Mora, who was at that time gefe politico of the district of San Dimas, say that he would drive the Abra Silver Mining Company away from the San Dimas mines. This conversation took place at Tayoltita, near the reducing works, and I believe that it was at the end of 1866, or the beginning of 1867. I know that it is a fact, that there was a firm determination existing on the part of all, or nearly all, of the authorities of the district of San Dimas to get rid of the said Company. I know this from my frequent conversations and the expression of the opinion of the people and the authorities, while I was employed by the Company in transporting provisions and other articles for them, as I have stated."
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> * * * * * *
>
> "I knew the late Prefect or gefe politico of the said district. His name was Macario Olvera and he was killed, a few weeks ago, at San Dimas, in a quarrel with his own townspeople. I believe that he was married to one of Judge Soto's family—at least it was so said and believed in the district. He was a great friend of Judge Soto, and I have heard him tell Olvera, the Prefect, that they would never allow the Abra Silver Mining Company to renew their mining operations in the district." (*Record*, 73.)

Now, in view of the evidence cited (and there is much more to the same effect in the record), what doubt can

there be of the substantial truth of Exall's testimony as to the reasons why he abandoned the Company's busines and property at Tayoltita? To quote from his first deposition (*Record*, 31):

> "The civil authorities of the legitimate government of Mexico under President Juarez also harrassed and annoyed us and interfered with the continuing of the mining operations of the said Company. I was arrested by the order of the local magistrate or judge of Tayoltita, whose official title, as I understand, was 'Juez,' and thrust into prison, and sentenced by him to a fine of $50 and imprisonment for two months. I had no trial, nor even an examination, except by him personally, and do not know for what I was arrested or imprisoned; but I here state positively that I had not committed any act, crime, or offense against the laws or people of Mexico, or any citizen or soldier of the same, nor against any of the authorities, local or national. I was released by the personal influence of a Mr. Granger, who had to promise payment of the said fine; no good reason ever having been given me for my arrest or release. I had frequently applied to the proper military and civil authorities of Mexico, both in Sinaloa and Durango, for redress and protection against the violence stated, but was rudely denied by both in every case, and could get neither; and these threatened acts and the acts of violence were encouraged and connived at by said authorities, if not actually instigated by them, which last I believe to be the fact also. By reason of these facts it was very difficult to keep men there at work, and *the prosecution of the work was greatly hindered and delayed, and it finally became utterly impossible to continue the mining operations of the Company, and I was compelled, with my men, to give up the same entirely, and to abandon the mines and all the mining implements and property of the Company to save our lives.*"

That Exall kept on to the last trying to continue the operations of the Company, appears from the records that have been so long withheld by the Mexican government. Those records show that he went to Durango, the capital of the State, about the middle of February, 1868, and *paid taxes on the Company's hacienda, mill, and merchandise* (*Record*, 743), and also (entirely contrary to the theory which has been maintained by the Mexican government and its agents in this controversy) *that work was going on in the mines until the abandonment.*

The second paragraph of the stipulation printed in the Company's evidence (*ib.*, 745), reads as follows:

> "That there are entries in the said books in October, November, and December, 1867, and *January and February, 1868*, against La Abra, La Luz, Arrayan, and Sanz mines, for fuse, gunpowder, or other items; also on 'mill account' in October, November, and December, 1867, for wood, salt, quicksilver, etc., there being a debit of $563.09 on that account in December, 1867, for merchandise, in which the wages of workmen in the mill, as well as in the mines, were paid."

The next specification of the XVIth paragraph of the bill is:

(11) That the officers of the Company paraded their rights as American citizens, that Superintendent Bartholow proposed, if certain taxes were imposed upon him, to hoist the American flag, and to have them taken from under it by the military, the result of which threat was, as he explained it to Treasurer Garth in his letter of April 10, 1866, that instead of paying three or four thousand dollars he only paid thirty dollars.

This allegation simply shows that on one occasion (two years before the abandonment) General Bartholow successfully resisted an attempt to collect an illegal tax of

$3,000 upon supplies which had been transported from Mazatlan to Tayoltita, and upon which he had already paid the "import duties" at the port of entry, by serving a notice on the tax collector containing the following statement (*Record*, 215):

> "If such a tax as this is imposed upon me, I desire General Corona to send here an officer empowered with written authority to take of my effects sufficient to pay it, for I shall, if anything like this sum is demanded of me, put my goods and property under the protection of the flag of the United States, and from under it I intend they shall be taken."

The goods were then in General Bartholow's possession at Tayoltita. If they had been stopped on the road, as the Company's trains were prior and subsequent to this incident, the result would probably have been different. It appears from the depositions of Cole and Clark, as well as from General Bartholow's deposition, that he encountered many difficulties which he did not describe in detail, although he alluded to them in some of his letters to Garth which are copied in the letter-press book. The first one which is copied in that book is dated February 6, 1866, and it alludes to a letter written by him to Mr. Garth "about the 1st Jany.," giving him a report of "operations up to that date." *This important letter was not copied in the book*, the earliest date in which is January 11, 1866; whereas General Bartholow's work for the Company commenced in the summer or fall of 1865. This is another proof of the incompleteness of the letter-press-copy book as a record.

That General Bartholow had difficulties not described in the press-copy book does not depend on his own deposition. Echeguren, one of the leading merchants in Mazatlan, testified (*Record*, 104):

> "I recollect to have heard from the first super-

intendent, General Thomas J. Bartholow, of the troubles and difficulties he encountered, *soon after they occurred*, on the road from this place to Tayoltita, *in 1865* and 1866, when attending to the transportation of the Company's machinery and supplies, being continually detained on the road by the said military people, and that he had to contend with them, and *to pay large amounts of money*, '*prestamos*', *in order to be allowed to go on.*"

The next specification is—

(12) That when Garth instructed Superintendent Exall, in his letter of July 10, 1867, to be firm in maintaining his rights as an American citizen in any difficulties with the authorities, the latter replied, on the 6th of October, 1867:

> "There are no difficulties about authorities, boundaries, or anything else concerning the mines or hacienda, provided there is money on hand, and money *must* be sent."

This is a quotation from one of those letters of Exall's, in which (as stated in his explanatory affidavit of May 1, 1878, *Record*, 670), he colored the situation to suit his own private purposes. This, and the other letters containing statements of the same kind, will be considered under a separate heading. (*Infra*, 359–365.)

That there were difficulties with the authorities known to Garth is very clear. It is to be noticed that in his letter of October 6, Exall acknowledged receipt of *three* letters from Garth, dated respectively July 10, July 20, and August 10. In this last letter, which was written after Garth had seen Señor Molina, and *had received Exall's report of June 11—the one which does not appear in the copy-book* *—Garth gave the following instructions:

* Garth's letter of September 30, mentioned in his of October 10, 1867, to Exall, *has not been produced*. It was probably written in

> "You must take all necessary and legal measures, by protest and otherwise, to secure our claim against the Government."

This the Company did, acting through Mr. Rice and Señor Chavarria, and this was the one thing necessary to fasten responsibility upon the Mexican government. If the protest or appeal had been made to our government, through our Minister or one of our consuls in Mexico, the Company would have been informed by the Secretary of State, that, having gone voluntarily into Mexico to engage in developing Mexican mines, it must apply to the proper Mexican authorities for protection or redress on account of the acts of the local magistrates, and be able to show a denial of justice before the government of the United States could intervene. Having of its own accord followed this course, all the Company had to do was to wait for a forum in which its claim could be tried, and it happened that our government was negotiating in that direction at the very time that the Company was suffering from persecutions of the local authorities at Tayoltita. But the Court of Claims says (*Record*, 839, 840):

> "The treaty under which the Commission convened, the fact of its meeting on the 31st of July, 1869, were matters of legal and public notoriety which could not have escaped the attention of persons interested in the property rights of the Company, its officers and attorneys; and in view of that, it becomes one of the strange incidents of this controversy that the presentation of the claim, involving more than $3,000,000 *should have depended upon what may be construed a casual meeting between Garth and one of the original attorneys in the City of Washington in the autumn of 1869.*"

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reply to Exall's missing letter of June 11th, which was sent from Mazatlan just after the troubles with the Mexican officials.

This is an entire misapprehension, because it is evident from the following testimony of Garth that General Bartholow, who held stock of the Company to the amount of $16,000, had been looking after his own and the Western stockholders' interests, and preparing to prosecute the Company's claim before the proposed Commission, prior to the "casual meeting" between Garth and Rose:

"Q. How did General Adams happen to be in your office that day when he met Green there?—A. He came there with a letter from General Bartholow of St. Louis. He came there with a letter of introduction from *General Bartholow* a short time before, *in which he said he had employed General Adams to go out there and take testimony,* and General Adams produced the letter. I had never seen or heard of the man before, and *we had to act in conjunction with the Western stockholders, who were more numerous than those from the East, and obtain their co-operation.* It was supposed they would not be capable of raising sufficient funds to employ the lawyer or party whoever went there, to take the testimony and expenses of it.

"Q. *Did Bartholow employ Adams to take the testimony without any communication from you or the Company in New York?*—A. *He did, and to my surprise.* I was very much surprised, because I had intended when I talked to them of sending another party. * * *

"Q. *Then this matter did not originate with you;* it seemed to occur to Bartholow also to prosecute this claim?—A. If I was to go back to the first history of it I could probably be able to state it better. I did not know it was necessary. I never knew of the Commission until the Commission was in existence. *Until General Bartholow called my attention to it, I never knew of the Commission at all.* Did not know there was such a thing in existence.

"Q. How did General Bartholow come to call your attention to it?—A. I don't know. I suppose he had seen it published in the papers.

"Q. How long before your interview with Judge Rose?—A. *That was before my interview with Judge Rose.*

"Q. Before your interview with Judge Rose, Bartholow called your attention to it?—A. Yes, sir.

"Q. By letter or in person?—A. By letter, because he was not in New York." (*Record*, 718, 719.)

Mr. Garth testified that he made the acquaintance of Judge Rose in Washington "early in the fall of 1869." (*Ib.*, 708.) Mr. Garth was a very busy man, and after Exall had returned and the Company had decided that it would not be safe to send any one down to the mines (*ib.*, 713) he had given the matter scarcely any attention; or, as he said, "the cow was dry and I was going to hunt a fresh one." (*Ib.*, 727.) Bartholow or some of the Western stockholders may have known soon after Exall's return that the convention of July 4, 1868, was under negotiation. Exall reached New York early in May, 1868. Bartholow may have been aware of the provisions of the treaty for a Commission, and that here was the only opportunity for an adjudication of the Company's claim, because, of course, the government would not press any particular claim when a general settlement by arbitration was in process of negotiation. And the convention provided for the adjudication of claims *whether they had already been presented to the respective governments or not.* (*Supra*, 4.) It was through Bartholow that Garth was informed of the organization of the Commission, the first meeting of which was held on the 31st of July, 1869. The treaty was proclaimed by the President of the United States on the 1st of February, 1869, within nine months, and it had been concluded on the 4th of July, 1868, within two months of Exall's return.

If Bartholow were living, it might be shown that the reason why the claim was not presented to the Govern-

ment of the United States prior to the time when Mr. Cushing was notified of it as agent of Mexico before the Commission, *in November, 1869*, by the Company's attorneys, Britton & Ely, was that the provisions of the Convention (*supra*, 4) allowing eight months from the first meeting of the Commissioners for the presentation to them of claims, whether previously presented to the Government or not, was known to him. But, be this as it may, the Company had laid the proper foundation for the of its prosecution claim against Mexico by its appeals to the State authorities for protection, under Mr. Garth's written instructions, and it can not be said, with any regard for the truth or the evidence, that its presentation of its claim to the Commission was *an afterthought*.

The next specification of this XVIth paragraph is:

(13) That as early as May, 1867, the said Garth, treasurer of said Company, advised Superintendent Exall, at the mines, that no more money could be sent him by said Company; that a draft on said Company for $5,000, drawn by Superintendent De Lagnel through the Bank of California, had been protested; that the said Exall must pay all expenses from the proceeds of the mines; and in July, 1867, the said Garth wrote the said Exall—

> "If it costs more than it comes to, the sooner we find it out the better, and the sooner we stop, the better for all parties concerned."

This allegation is simply in the line of Mexico's contention in the original trial, that the Company abandoned its mines because they were unprofitable and its funds were exhausted. But that theory leaves unexplained the abandonment of new buildings and modern machinery, supplies, mules, implements, etc., which had cost such a large amount of money. Nor is the Mexican idea that all these belongings were left in Granger's care,

as agent for the Company, compatible with the fact that *Granger never wrote a line to the Company or the Company to Granger after Exall left.* The temporary disappointments or financial difficulties of the Company are not incompatible with the want of security for life or property at Tayoltita. The two things could co-exist, and, as already suggested, even if the financial necessities were as urgent as Exall, in some of his letters, represented, it would not follow from that that he did not finally abandon the property and business of the Company at Tayoltita because he was apprehensive for his safety, and had found it impossible to endure the threats and oppressions of the local authorities and their interference with the Company's business any longer.

Now let us see what Exall reported to the Company on his arrival in New York. Garth states what Exall said, as follows (*Record*, 705, 706):

> "Q. Will you tell us what Exall said to you, in substance, on his return from Tayoltita to New York, as to the reason why he had left?—A. He came into my office unexpectedly to me, and stated that he had been so interfered with by the officers or magistrates that he was unable to conduct business, and that he had himself been imprisoned, and he said to me that he was imprisoned about two weeks, and that he feared for his life; he was afraid of his being assassinated or being killed and he had to leave. That was the substance of his statement to me."

On this point Mr. Ely testified (*ib.*, 655):

> "In May, 1868, Mr. Exall came to my office in the city of New York. After shaking hands with him, I said I was surprised to see him here; that I supposed he was in Mexico making silver bricks for La Abra Company, and he stated that he had been compelled to skip out between two days. I think that is the very expression he used, 'skip out between two

days.' And I remarked I hoped he had not been committing any crime down there and had to leave the country in that way. *He said he got alarmed for his personal safety and was fearful of what might happen to him*, and he went out in that way as the safest way to go. I asked him what was the danger, what was the trouble. Well, his reply was that *the local authorities down there were a very bad lot; that they were arbitrary, and if they got down on a man they would do about what they liked with him, and there was not much, if any, chance for redress.*"

Mr. Garth, on cross-examination concerning Exall's statement, on his return, why he had abandoned the mines, said:

"*He stated to me that he had done everything he could for the protection of the Company and its rights, and that he left because he was afraid of his life, and there was no possible chance to prosecute the business there on account of the interference by the officials.*" (*Record*, 712.)

In further cross-examination Mr. Garth was asked why somebody was not sent down to care for the property after Exall's return, and he replied:

"I suppose the idea was that it was useless to send a person down there to be killed or run off; that it was impracticable to do it at the time.

"Q. What was the idea of abandoning the thing completely, just as you would anything you threw into the highway? What was the idea of abandoning the thing completely and giving it up?—A. The idea was that it was useless to make any further attempts to work the property down there, to develop the property down there—it was impracticable.

"Q. Did you suppose that anything that was being done down there could rob you of the right of property in those rich mines, as you call them?—A. I supposed they would be left there, and whoever chose to take them would take them.

"Q. Anybody could go and denounce them?—A. I don't know the law in respect to that. There are certain times when they can be denounced and certain times when they can not.

"Q. Did it occur to you or the directors that the Government of the United States was behind you and would not permit you to be robbed of those valuable silver mines?—A. It did not then. I would not know how to proceed about it. *It was simply we were driven out for the time being and could not do anything. The time might come when, under different conditions of things, we might endeavor to carry on the business there again. But at that time we felt it would be impracticable and impossible to do so.*" (*Record*, 725, 726.)

The following is from Exall's testimony before the Commission (*Record*, 32):

"Question number nine. Why was nothing further done by you and said Company?—Ans. Because I did not dare to return and resume mining operations there. I was and am satisfied that I could not do so with safety to the life of myself or my workmen, or with safety to the property of said Company, such was the hostile feelings or prejudice against said Company as citizens of the United States, and further prosecution by said Company of mining operations there, both on the part of the citizens and the local and national authorities of the Mexican republic and the violent acts resulting from that feeling and prejudice, being encouraged and connived at by said authorities, as I have stated. And I returned to the State of New York, and *advised said Company that it was useless to attempt any further working of said mines, and gave them the facts above stated as my reason for that advice;* and I understand that said Company was so advised by others who were citizens of Mexico."

In this connection, see Cole's account of his interview with Olvera, and his report of it to one of the members of La Abra Company. (*Record*, 58.)

(14) The next specification states (*a*) that the ores were worthless; (*b*) that the only reduction of ore at the mill comprised ninety tons, being made in August, 1867, and yielding less than $5 per ton; (*c*) that the rest of the ore was so poor that, according to Exall's report of October 6, 1867, it would not pay "to throw it in the river;" and (*d*) that for this reason, if for no other, the ores were not carried off by Mexicans, and are still at the mines.

The statements (*a*) and (*c*) will be considered together.

It is to be remembered that the richest of the ores—those from La Luz—were the most rebellious, and that *Exall worked none of the ores that required roasting.* (*Record*, 273.) According to Elder (*supra*), there were 500 tons of La Luz ore on the "patio." It was from this ore that he obtained such encouraging results by the fire assay which he made for Col. De Lagnel at La Puerto (*Record*, 483), and it was from the same mine that the 80 cargas were taken which were reduced by the Mexican process in presence of Garth and Bartholow, and which produced over $400 per ton. (*Supra.*)

In his letter of February 21, 1866, to Garth, General Bartholow reported the discovery of a small vein in La Luz, an offshoot from the main vein, from which he was taking out ore worth at least $500 per ton (*Record*, 207), and on March 7 he reported that the product had become "of surprising richness," and added (*Record*, 210):

> "If the opinion of the Mexicans, including Don Ygnacio Manjarres, is worth anything, these say it will yield $1 a pound. I think this is an over-estimate, but I would not be surprised if it would assay $1,000 to the ton. I have put up about two pounds of it, which I will send with this letter, by Wells, Fargo & Co.'s express. On its receipt I would be glad if you would have it assayed and report the result. *This ore we put up in gunny sacks as fast as it is mined and store it in the wareroom.*"

In the same letter, and referring to the ores from El Cristo, he says:

> "In many pieces virgin gold is plainly seen with the naked eye. Mr. Cullins, our head miner, says he has never seen such a mine in all his experience in California and Mexico, and he has been working in mines for fourteen years."

These letters form part of the "*newly-discovered evidence.*" In Bartholow's deposition for the Company, he said (*Record*, 168):

> "The ores thus obtained were carefully assorted, packed to the hacienda, and piled up in order for beneficiation, possibly to the amount of 200 tons or more, all of which were of good quality, and their value in pure silver per carga was from 3 to 15 marks, or an average of 8 or 9 marks per carga. This I know to be true from experimental assays of average lots so assorted and tested by me."

In the "newly-discovered evidence" (*Record*, 219) Bartholow says in the last letter he wrote to Garth before leaving the mines (April 10, 1866):

> "Our ore pile is regularly and steadily increasing; the stock on hand is between 550 and 575 tons, and hereafter El Cristo will steadily increase its yield, as we have 'struck' ore in the new tunnel."

In the Senate investigation, Mexico's witness, Colonel De Lagnel, said (Sen. Rep., 2705, p. 54):

> "I remember the wild excitement among the miners, because when the ore was brought down you could see the gold in streaks as large as a big diaper-pin head, little pellets of gold along like fine shot, so as to leave a line of gold.
>
> "Senator BROWN. That, then, was very rich gold ore?

"The WITNESS. I took it for granted that that was rich ore. All the miners seemed to be in a state of excitement. They found it out by sinking a shaft, I think, for ventilation, or for the easy dropping of the ore, or some such purpose as that, from the upper level, I forget just what, and in that way they found this valuable ore."

In the last letter, which is copied in the press-copy book from De Lagnel to Garth (February 5, 1867), De Lagnel says (*Record*, 262):

"The mines are looking better, yielding *more*, and, I believe, *richer* metal."

In his letter of May 17, 1867, from Mazatlan, to Garth (*Record*, 266), Exall said:

"A day previous to my leaving Tayoltita, I spent a day at the mines. While at the La Abra, I picked up two or three pieces of ore, which was then being taken out. *Made no selection.* The evening before leaving the hacienda for this port, I assayed the several pieces. The assay was better than previous assays of any ore on the patio, giving me $378 in silver and a *large percentage in gold.* It being very late in the day before I got through melting down, was unable to get an accurate gold value. The labor from which this ore was taken is *improving, and the vein widening* ever since it was first started on."

Between that time and January 31, 1868, Exall spent nearly $3,000 in getting ore out of La Abra alone, as appears from his ledger (Coney's Exhibit No. 28), the balances from which are printed in Appellant's Evidence. (*Record*, 745.)

The quality of the ore on the patio was doubtless irregular. The testimony of Cole, an eye-witness and expert, as to its value and quantity, has already been cited. (*Supra*, 76.)

It is certainly clear from the foregoing citations, sev-

eral of which are from the "newly-discovered evidence," that the allegations (*a*) and (*c*) that the ores were worthless, and would not pay to throw into the river, are unfounded. The inferential statement (*d*) "that for this reason (the alleged worthlessness of the ores), if for no other, the ores were not carried off by Mexicans," is, as we have already seen, overwhelmingly disproved by the evidence. Chavarria's testimony on this point has already been cited. (*Supra*, 192.) Chavarria also testified that the Prefect, Mora, admitted to him that he had made profits out of the ores stolen from the Company (*Record*, 83, 19th question), and Mora said that his successor, Olvera, and Judge Quiros would not listen to Exall's complaints about ores that were stolen from the Company by people who were out of employment. (*Supra*, 218.)

Exall says that he saw "piles of very rich ores" which belonged to the Company in Judge Soto's house (*Record*, 152), and Soto admits that he had reduced ores that came from the Company's mines, but says he got them from miners who had permission to take them. (*Ib.*, 129.) The following is from Senator Brown's minority report, page 41, under the heading: "*Proof that an Immense Quantity of Ore was Stolen:*"

> "But there is a mathematical demonstration of the truth of the Company's claim that the best of the ores which were abandoned have been removed since the abandonment. The quantity of ore left on the patio when the property was abandoned has been estimated by some of the witnesses for the Mexican government as high as from 10,000 to 14,000 cargas. This was the estimate of Mr. Jesus Torres. (*Record*, 137.)
>
> "No witness makes the quantity less than 700 or 800 tons. The Umpire found the quantity to be 1,000 tons. One of the three witnesses brought up by the Mexican government from Mexico in the recent investigation testified before the subcommittee

> that the pile of ore at the hacienda was 'the same size the last time he saw it as it was the first time;' that 'there was about 500 or 600 cargas;' that he *first* saw it 'when he went to work in the mines.' This was in 1871, as fixed by the date of the denouncement of 'Rosario,' including 'La Luz'—the mine referred to by the witness (Francisco Torres), which he worked in partnership with James Granger, in whose name the denouncement had been made. (*Ibid.*, 29.) Jesus Torres swore that when the Company abandoned the mines in March, 1868, there were from 10,000 to 14,000 cargas of ore (most of it, he said, was worthless rock) at the hacienda. Francisco Torres swears that in 1871, about three years subsequent to the abandonment, there were only 500 or 600 cargas left. What had become of all the rest?"

It was not only the Mexican witness, Jesus Torres, that swore to the fact that there were from 10,000 to 14,000 cargas at the Company's hacienda, but Francisco Acosta also swore that the statement of Jesus Torres was "an exact account of the particulars of the transaction to which it alludes." It is remarkable that Jesus Torres states that this great pile was "covered over with about 300 or 400 cargas of *real ore*." (*Record*, 137.) It is also remarkable that in his examination in this suit Francisco Torres reiterates his statement that he did not take any notice of the ores at the time La Abra Company was working the mines. But, having been instructed meanwhile, he said that when he did take notice of them there were from 5,000 to 6,000 cargas! (*Record*, 549, 550.)

Dahlgren's testimony on this point is very suggestive (*Record*, 98):

> "I did, however, more than once observe said ores. The Company left great piles of them on the 'patios,' which they had taken out and packed down from their said mines, and the average of them were said to be very rich of silver metal, with a small

> percentage of gold; but I also observed there unmistakable evidences of that which had been a common report for a long time, that those piles of ores had been torn down and the richest of their metals culled out and carried away, leaving upon those extensive 'patios' the poorest of them, which were scattered over a large surface, covering, I should say, at least a quarter of an acre of ground. It was said that the Company abandoned about a thousand tons of those metals, *but not half of them remained when I saw them in 1870;* and those that were left gave evidences of having been torn down, culled out, and rejected."

Allegation (*b*) is also entirely erroneous. Instead of there being only one reduction at the mill there were at least four, and the one to which the Government alludes was not made in August but in July. See Exall's letter to Rice, July 14, 1867 (*Record*, 272), and to Garth (*ib.*, 272, 273). This was the second reduction, the first having produced the bullion which De Lagnel tried to take back with him to New York. Other reductions or "runs" are referred to in Exall's letters, in which he promised to make statements of their results to Mr. Garth, which, if ever made, *do not appear in the letter-press copy book.* These other reductions or "runs" are proved by Elder, who testified in the Senate investigation that when he was in charge of the Company's mills he extracted bullion to the value of about $4,000. (Rep. No. 2705, Sen., 559.) For the "returns from the mint for bullion," as they appear in the Company's books, see the 3d paragraph of the "Stipulation as to certain entries" (*Record*, 745), amounting to $3,804.98, exclusive of the first reduction, which does not appear in the books. Exall testified that bullion to the amount of $17,000 in all was extracted by him (*Record*, 156), but some of it was not entered in the books. (*Record*, 670.) See, also, on this same subject, *supra*, 72–78.

(15) The next specification, "that as early as July, 1867, the Company was in debt at Tayoltita over $3,000, exclusive of the $5,000 draft, above mentioned," is erroneous. But, if it were correct, then the fact that Exall carried on the Company's work and paid the Company's debts, at Tayoltita, for so long a time, without receiving a dollar from New York, would only show more clearly that the Company's receipts at Tayoltita from the mines and the mill must have been much greater than Mexico's agents and the Government have all along insisted. There was a balance of $1,733.58 cash on hand at Tayoltita July 1, 1867, and the sum total of the Company's indebtedness at Mazatlan and the mines on the same date was $3,211.35. (*Record*, 270.) This indebtedness included $1,252.94 borrowed from Echeguren, Pena & Co., at Mazatlan, and bills of $841.76 for merchandise not due until the following September and October. The difference between cash on hand and the total indebtedness was $1,478.17, which, however, was more than covered by the amount received the same month for bullion from the mint at Durango—$1,525.82, the bulk of which was paid over to Echeguren, Pena & Co., in settlement. (*Record*, 273.) So that in July, 1867, the Company was free of debt at Mazatlan and at the mines, and had its stock of goods in the store, and its supplies for the rainy season on hand, besides the near prospect of further funds from the mint at Durango for the reduction then in progress at the mill.

(16) The next specification relates to a judgment by default against the Company in New York in favor of Garth for over $50,000. This judgment (*Record*, 468) occasioned no embarrassment to the Company, for it was recovered in a friendly suit brought by John H. Garth for himself and other members of the Company for the simple pur-

pose of securing advances which they had made to the Company beyond payment for their stock.

(17) The statement in this specification that "the superintendent was obliged, in order to keep up the *semblance* of operating the mines, to employ four Mexican miners, * * * on a promise to pay them in goods," shows how firmly fixed in the mind of Mexico's agents and the Government's counsel the idea was that the Company's work in July, 1867, at Tayoltita, had practically come to a close. But in a letter of *August* 5, 1867, to Mr. Garth, *only a few days subsequent to that time,* Exall says (*Record,* 273):

"*I am now working 23 men by carga.*"

And at the date of that letter, in addition to these workmen in the mines and the Company's foremen, there was a force working at the mill, which, in the same letter (*Record,* 272, at the foot of the page), Exall said is "now running." Besides these, there were also the employees in the hacienda, the stable, the blacksmith shop, and the store.

(18) The next specification relates to an alleged letter of Exall to Garth, January 24, 1868, declaring he would leave for the East on the next steamer if he did not receive assistance from Garth. The letter cited in this specification was copied in the press-copy book, but was probably never sent, for Mr. Garth testified that he had no recollection of ever receiving it, and that he was surprised at Exall's arrival in New York. There were certain statements in the letter, about which Mr. Garth was questioned, which tended to show that it had never been sent. (*Record,* 706, 729.)

Besides, it is dated after the usual monthly sailing of

the mail steamer, which left Mazatlan about the middle of each month.

As to the other statement in the same specification, that Exall expressed his intention to Sundell and other persons of going to New York for months before he left the mines, see *supra*, 228. In his examination in this suit, Sundell deliberately evaded stating that Exall had said anything to him on the subject. (*Supra*, 229.)

(19) In this specification complainant asserts—

> "That said Exall, on the 26th day of February, 1868, placed the said James Granger in charge of the mines and property of said defendant Company, and left said mines in said month of February, and not, as sworn to by him in his affidavit in support of said claim, on or about the 20th day of March, 1868."

Why should Exall have left Tayoltita so long before the steamer left Mazatlan? That he was there on the 15th, ready to sail, and hoping "to be off to-morrow," appears from his letter of that date to Granger. (*Record*, 286, 287.)

There is in the letter-press book a copy of the following note from Exall to Granger (*Record*, 281):

> "TAYOLTITA, *Feb'y 26, 1868.*
>
> "MR. JAMES GRANGER:
>
> "*Sir:* As circumstances are of such a nature as to compel me to leave for San Francisco, and probably for New York, to inquire into the intentions of this Company, I place in your hands the care and charge of the affairs of the La Abra S. M. Co., together with its property.
>
> "You are invested hereby with all power confided to me, of course acting in all your transactions with an eye to the interests of the Company.
>
> "This will, to you, should occasion require it, be

ample evidence of the right possessed by you to act in their behalf.

"Very respectfully,

"CHARLES H. EXALL,

"*Adm'r La Abra S. M. Co.*"

The fact that this note is copied in the letter book does not prove conclusively that it was delivered. Granger might have found it among Exall's loose papers, as Exall suggests in his explanatory affidavit, or Exall may actually have given it to him for the purposes they had in view. Exall says (*Record*, 670):

> "Preparatory to so going, I drew a paper addressed to James Granger, which purported to invest him with my authority and to give him power to act for the Company. I had no power to confer, being only an acting superintendent, nor authority to confer such power if I had any; but *it was necessary for the purposes we had in view* that he be in possession, and that he should seem to Mexicans to have the proper authority. Had I gone then, I intended to return. But I reconsidered my decision to go at that time, and concluded I ought to remain longer before going, and await still more alarming indications from the people and authorities, and the paper I have referred to *was never delivered to Granger. Whether I destroyed it or left it among the loose and discarded papers at the hacienda of the Company I do not remember.* I remained there some time afterward, but I waited too long, and the explosion, which I believed to be several months' distant, came unexpectedly, and the expulsion of the Company, and my abrupt departure to save myself from personal harm, and the complete abandonment of everything belonging to the Company, took place as I have stated in my depositions."

As already observed, Granger had no communication with the Company whatever from the time of Exall's

departure. If he had written to the Company he would undoubtedly have copied what he wrote in the press-copy book as he did his note of August 12, 1868, to the collector of taxes. (*Record*, 282.)

This "autograph letter" of Exall's was put into Sundell's hands for translation into Spanish very soon after Exall left, and afterwards, on the 26th of September, 1873, while the Commission was in session in Washington, and more than two years before the award was rendered, it was produced in court at San Dimas and translated under judicial sanction at Granger's request. The Mexican district attorney, Gaona, who was one of the attorneys that acted for the Mexican Government in taking testimony in Mexico against the Company's claim when it was pending before the Commission, was asked on his cross-examination in this suit why Exall's "autograph," as Gaona called it, or the translation of it, was not produced before the Claims Commission at the original trial, and he said he could not answer. (*Record*, 596, cross-question 121. See, also, *supra*, 109, 110.)

Was not the reason for the non-production of this letter or the translation of it, by the Mexican authorities before the Commission, the fact that it began with the statement that circumstances were of *such a nature* as to *compel* Exall to leave for San Francisco (the readiest accessible point to the United States), and probably for New York, to inquire into the intentions of this Company? (*Record*, 281.) The hostility and opposition to the Company had not been concealed. Gaona and Hernandez, who were obtaining the defensive evidence in Mexico, knew what Soto, Mora, Perez, Olvera and Quiros had said and done, and what the circumstances were that compelled Exall to leave. So that, even if Exall had delivered that letter to Granger, and had left Tayoltita on the 26th of February, instead of a week or two

later, it would not be incompatible with his reasons for leaving, as he stated them, on his return, to Garth and Ely, and later in his depositions on behalf of the Company before the Commission.

(20) The statement in the next specification—

> "That the said Exall continued to instruct the said Granger, by letters from Mazatlan, San Francisco, New York, and Richmond, down to July 18, 1868, to keep the books and property of the Company secure, but to find out quietly how he could dispose of the remaining property"—

would have been more serious if the Government had alleged that these letters were written with the knowledge or consent of the Company. But none of the directors had any idea that Exall was writing such letters to Granger, nor that Exall, through his relations with Granger, and the latter's relations with Soto, was trying to get some interest in the mines for himself, or some pecuniary advantage, in some way, from his enforced abandonment of the Company's business and property. He was not in the employment of the Company when he wrote those letters, and they show, all too clearly, the selfish and fraudulent purpose for which they were written. Granger was to keep the books securely, not because the Company wanted to have them secreted or destroyed, but because Exall proposed to have false entries made in them by Granger (by whom the last set of books had been kept) increasing the amount of the Company's apparent indebtedness to him and to Granger, so that if Exall succeeded in forming a new company and arranging for the payment of the old company's indebtedness, he and Granger would profit by the change, even if the new company should soon share La Abra Company's fate.

Exall had heard that there were persons who thought of buying the property, and after putting himself in communication with them, he said in his letter of May 8th to Granger that he would represent to them that *things were in a secure state at the mines.*

In his next letter to Granger (June 15, 1868), he said (*Record*, 289):

> "The indebtedness of the Co. to us I have represented to these parties as being to Jas. Granger, $2,850; to C. H. Exall, $5,113.32; Bank of Cal., $5,000. The statement regarding your account and mine, *as represented*, is over and above any and everything which we have gotten from the Co. To be a greater inducement to these parties to purchase, and to show them that I have confidence in the mines, at their request I have agreed to take in stock to the amount of $2,000, and have taken upon myself to act for you to the extent in stock of $850. This I hope will meet with your approval. *Should anything occur let your statement concur with mine.*"

In his next and last letter to Granger (July 18, 1868) Exall said (*Record*, 290):

> "In my previous letter, I instructed you in reference to the figures representing your and my amt.; keep it as it is, but make no entry. * * * I will inform you in time to make proper entries, sending a list of expenses, &c."*

But Exall was very anxious that the persons whom he was trying to induce to make an offer to La Abra Company (involving the payment of the falsified amounts to him and Granger) should not "come in contact with Green, Martin, or *any one who would prejudice them*," &c. Green had been imprisoned and ousted from his San Louis mine, near Tayoltita, and Martin was associated

* These are the letters, contained in the Government's Exhibit B, which the Court of Claims excluded because written after Exall had left the Company's employment. (*Supra*, 195, 196.)

with Rice in the ownership and management of the Candelaria mines at San Dimas, and Rice (who was a friend of Garth's and Bartholow's) and had been in charge of the Durango Company's works at that place for several years, was thoroughly informed in regard to the interferences and persecutions on the part of the local authorities, which had led to the abandonment of La Abra Company's business and property at Tayoltita. It was this same Mr. Rice, who employed Chavarria to apply for protection and redress for La Abra Company to the State authorities at Durango. It will be remembered that prominent Mexicans were interested in the Durango Company, and that Dalghren, Martin and Birmingham have all testified that it was on account of that interest that their Company was protected.

Exall's scheme for a new company came to nothing, La Abra Company paid him what they owed him, and the record shows nothing of any further relations or correspondence between him and Granger.

In his explanatory affidavit Exall says (*Record*, 671):

> "I hoped that Granger, instead of some Mexican, would get possession of the property, and which I thought through his late affiliation with a Mexican family he might be enabled to do, and which he did, as I learned, except that, as I am informed, Judge Soto, the father of his wife or mistress, took possession of the Company's hacienda."

Granger (*Record*, 51), Avalos (*ib.*, 52), Martin (*ib.*, 165), and Adams (*ib.*, 185), all testify that Judge Soto took possession of the Company's hacienda and resided there after Exall left.

Martin, who lived at San Dimas from the fall of 1868 to 1870, said (*supra*):

> "Guadalupe Soto was local judge at Tayoltita, and *it was notorious that he resided at the hacienda of*

> *the claimant*, the Abra Company, after that Company was broken up there."

General Adams, who made two visits to Mexico on behalf of the Company, found Soto in possession of the Company's hacienda in 1870 and Francisco Torres in 1872. (*Record*, 185.)

It seems from Torres' testimony that Granger's relations with "Cecilia" continued for a long time—almost till his death (*Record*, 559), which occurred in Mexico in 1878 or 1879, shortly after he delivered the Company's books and papers to Gaona. Exall died about the same time—probably somewhat later.

In that same explanatory affidavit Exall told how his scheme for a new company came to naught because (*Record*, 671)—

> "The party subsequently learned, through some channel, of the hostility of Mexicans to American companies, and of the actual expulsion from the country of La Abra Company, and he dropped all negotiations on the subject, and nothing ever after came of it."

(21) In the next specification it is alleged that on May 8, 1868, Exall authorized Granger to extend and renew the agreement with Judge Soto, which Exall had entered into February 7, 1868, and that this same Soto is one of the Mexican officials afterwards alleged by said Exall and other witnesses to have driven him from the mines and compelled their abandonment by the Company.

The lease of February 7, 1868, was given to placate Soto after his seizure of the property had been held to be illegal. Exall's letter of May 8, 1868 (*Record*, 288), tells Granger not to renew this lease of the lower hacienda "more than a month at a time." Exall's object in this is now sufficiently clear, so is the fact that he and

Granger were dealing with each other in furtherance of their own schemes and without the knowledge or consent of the Company. Exall tried to interpose Granger between the Company's property and Soto, but Granger cast in his lot with the latter, and aided and abetted him in appropriating the Company's property.

(22) The next specification is, that Exall, failing to collect his unpaid salary, sued the Company for the arrears, and also endeavored at the same time to form a new company to take charge of the mines, assume the indebtedness of La Abra Company to him and Granger, and to send him (Exall) back as superintendent of the mines. Nothing further need be said in regard to this allegation, except that there is no warrant in Exall's letters for the statement that he endeavored to be sent back as superintendent of the proposed new company. He said in his letter of May 8th (*Record*, 288) that "in case this party should purchase he would accompany them to the mines," but it is evident from the following, in his next letter (*Record*, 289), that some one else expected to be superintendent:

> "The prime mover in the affair is a man who knows a good deal concerning the property, and who expects (if he succeeds in organizing a company) *to get a position at the mines.*"

(23) The next specification states that Granger remained in charge of the mines until after August 12, 1868, when he advised the Mexican Collector of Taxes that there was no money or effects with which to pay taxes, but that the superintendent would return in November, 1868, when they would be paid. Granger's letter of August 12, 1868, to the tax collector is referred to as evidence that he remained in charge of the said mines and property till that date, but it is clear that he

was acting then in the interest of Soto and himself, and not in the interest of the Company or with its knowledge or consent. It is also clear that Granger told a falsehood when he said that "the superintendent would return in November," for Exall, in his letter of May 8th, had told Granger that Garth "didn't seem to intend to do anything more," and, as we have seen, the scheme for a new company and the payment of the falsified accounts had failed. Of course Soto did not want to pay taxes on the Company's property, as long as he could keep possession without expense, and Granger seems to have thought he could put the collector off in that way.

(24) The next allegation, one of great importance, is—

> "That the said Exall and the president of the said defendant Company, George C. Collins, and the first superintendent of the said defendant Company, Thomas J. Bartholow, grossly and fraudulently misstated and exaggerated in their affidavit made in support of said claim, *the amount of money expended by said defendant Company in the purchase and operation of its mines and property, and that the said defendant Company expended in such purchase and operation much less than $200,000.*"

We have already seen that the Umpire accepted Mr. Collins' statement of the expenditures of the Company as true and allowed the amount as stated by him in the award. (*Record*, 9.)

Exall and Bartholow testified as to the *damages* which they thought the Company had suffered (*Record*, 33, 173), and Bartholow also testified as to the purchase price of the mines (*ib.*, 167), but neither of them made any statement as to the amount of the Company's actual outlay in its Mexican enterprise.

Granger, in his second examination by the Mexican government, said (*Record*, 119):

> "That he supposes it to be true that the Company has spent $303,000 in the purchase of their mines and machinery and in working the same."

Sloan, *as a witness for the Mexican government*, said (*Record*, 120):

> "That at the time he was a clerk for the Company, he saw, according to the statement of the superintendent, that they had expended $303,000 and had taken out a little less than $6,000 in silver."

This amount of $303,000 is the amount stated in the Company's memorial as the amount "they had expended in the purchase of said mines and their working" (*Record*, 5), and the Mexican district attorney had a copy of the memorial when he framed his questions for the witnesses. (*Record*, 106, foot of page.)

Mr. Collins' statement of the Company's receipts and expenditures, which was adopted by the Umpire (*supra*, 278), never has been and can not be seriously questioned. The items are as follows (*Record*, 38, 39):

"From subscriptions and sales of stock	$235,000.00
"Lent and advanced	64,291.06
"Due for rent, expenses, salaries, law expenses	42,500.00
	$341,791.06."

The date of Mr. Collins' deposition, in which this account is stated, is September 28, 1870. It will be observed that in Mr. Collins' statement (*Record*, 38, 39), he says that it was the amount received from sales of stock ($235,000), and advances ($64,291.06), making a total of $299,291.06, and not $303,000, which

> "was expended by said Company in the purchase of

said mines as aforesaid, and in the purchase of supplies, mules, machinery, and a ten-stamp mill to be used at said mines, and for the transportation of the same, and in the construction and erection of said mill, machinery, houses, dam, raceway and mining works generally at said mine, and in work upon said mines and the extraction of ores therefrom."

The annual reports of the Company put in evidence by the Government (*Record*, 39, 40), as explained by Ely (*Record*, 653, 654), Baldwin (*ib.*, 678, 680), and Garth (*ib.*, 704), and the Company's stock certificate book produced by Mr. Ely and delivered to Government counsel in this proceeding, show that the subscriptions to the stock amounted to $157,000, and that they were paid in gold or its value in United States currency. The premium on gold, which at that time was a commodity, and not current as money, is to be reckoned, under the stipulations between counsel in this suit (*Record*, 745), at 50 per cent., which would make the value of the stock subscriptions $235,500 in United States currency. This accounts for the first item in Mr. Collins' statement. The next item, "lent and advanced," $64,291.06, is largely made up of the judgment recovered by John H. Garth for himself and others, July 3, 1867, in a friendly suit, as hereinbefore stated, for money loaned in the sum of $53,670.11. (*Record*, 468.) Other sums were advanced to the Company, after the advances included in the judgment; *e. g.*, the amounts paid to De Lagnel in May or June, 1867, and to Exall, about a year later, in settlement.

The third item explains itself; and when it is remembered that the Company or the original associates had been engaged in their Mexican enterprise for more than five years at the date of Mr. Collins' first deposition (the

expenses of the visits to the mines having been incurred in the spring of 1865), the amount of $8,000 a year, in round figures, for rent, officers' salaries, and legal expenses in New York and in Mexico was certainly moderate. No question was made before the Commission in regard to the Company's receipts or expenditures. If the Mexican agent had thought that anything would have been gained by examining Mr. Collins on that subject, he could have been examined at any time before the Mexican Government filed its evidence—October 30, 1873. And it may be as well observed here as anywhere else that the Mexican Government would have had no difficulty, under the practice of the Commission, in filing any important evidence it might have obtained up to the time in 1875 when the claim was tried by the Commissioners.

It can now be shown to a demonstration that the great bulk of the amount named by Mr. Collins was actually disbursed by the Company in its operations in Mexico. According to Del Valle's testimony (*Record*, 67) he received $57,000 "in American gold," for the mines which he sold to Garth and Bartholow, and the "stock and fixtures of the store," amounting under the aforesaid stipulation to $85,500 in United States currency.

The stock issued to Hardy and Luce for their interest in La Abra mine ($22,000) was on a gold basis and amounted to $33,000 in United States currency. The balances in the books, produced by the Government, show an outlay of $169,112.14, which includes $50,700 on "mines and hacienda account," deducting which there remains $118,412.14 sent to Mexico by the Company, or drawn upon the Company from Mexico (exclusive of the purchase price of the mines) in gold, costing the Company (as per the aforesaid stipulation)

$177,618.21 in United States currency. Recapitulating, we have—

Mines, etc., purchased from Del Valle and Manjarres, U. S. currency.....	$85,500.00
La Abra (stock of Co. on gold basis) U. S. currency.....	33,000.00
Book accounts, exclusive of mines, U. S. currency.....	177,618.21
	$296,118.21

This is less by $3,172.85 than the amount stated by Mr. Collins as having been spent in Mexico, including the purchase price of the mines, but the shortage may be accounted for by the fact that the balances printed on page 745 of the *Record* are taken from Exall's ledger (Ex. 28), and that the books of original entry seem to have been posted up to a date prior to the abandonment.

(25) The statement in the next specification—

> "that instead of paying gold for twenty-two twenty-fourths of La Abra mine, as was sworn by the said Bartholow, the said defendant Company paid for such interest in La Abra mine in stock of the said defendant Company"—

is doubtless intended to suggest that Bartholow swore falsely. But Bartholow's statement was essentially true. The Company was willing to pay $22,000 in gold to the vendees for their interest in La Abra mine. But the vendees desired to invest that amount in stock at par; and so, instead of actually taking the gold, or its value in currency from the Company for their interest in the mine and paying the amount right back to the Company for the stock, they took the stock and made the conveyance "to avoid circuity of action." One of the vendees (Hardy) also took additional stock at par in gold, for

which he paid cash, like the other stockholders. (*Record*, 212.)

The concluding statement of this specification is, in substance, that the remaining two twenty-fourths interest belonged to a person who, although a claimant against Mexico before the Commission, brought no claim on account of his interest in La Abra mine. What the owner of the other two twenty-fourths did or did not do is immaterial in this case, and there is no evidence who the owner of the outstanding interest was at the time the Company's claim was filed.

(26) The next specification—that the Company did not purchase 550 feet of the Nuestra Señora de Guadalupe mine, as sworn by the said Collins, but 550 shares of the stock of the Company of the same name, is disproved by Del Valle's testimony (*Record*, 77), and by the deed to the Company. (*Ib.*, 28, Doc. No. 11). This interest in that mine was "thrown in," and the point now suggested by the Government was not raised by the Mexican agent before the Commission, although the facts were known to both sides. The point does not involve fraud or deception on either side, and it should be kept in mind that no allowance was made by the Umpire to the Company for the value of any of its mines, but (with the exception of the ore on the "patio") only for the actual expenditures or liabilities incurred by the Company in the prosecution of its enterprise, which the Umpire found it was compelled to abandon by the unlawful acts of the Mexican authorities.

(27) and (28) The statements in these specifications that the investment of the Company derived from reduction of the ores was $420.09 instead of $17,000, and that the ores extracted and abandoned were worthless, though

estimated by the Umpire at $100,000, have already been refuted in the discussion of specification (14) *supra*.

(29) and (30) The next two specifications are that the affidavits of Gamboa and Loaiza, made in May, 1870, and submitted to the Commission were false, and procured by bribery and other unlawful means by the agent of the Company, and that Dahlgren's affidavit, also submitted to the Commission, was false, and not made by said Dahlgren. The Government's failure to produce Gamboa, Loaiza, or Dahlgren, or to impeach the truth of their depositions before the Commission, has already been considered (*supra*, 209 *et seq.*), and nothing further need be said concerning them and their testimony.

Exall's Letters.

The discrepancies between Exall's depositions and some of his statements in his letters to Garth will now be considered in connection with his explanatory affidavit of May 1, 1878. This branch of the case is discussed in Senator Brown's minority report (pp. 27–35), the one in which Senator Sherman (then Chairman of the Foreign Relations Committee) concurred to the extent that the Umpire's award in this case should be regarded as final and should be paid in full. In his explanatory affidavit Exall says (*Record*, 668, 669):

> "There were a number of letters written by me while in your employment and subsequently, which, without explanation, may in part be considered as differing from my testimony. They were written between the early part of my administration of the affairs of your Company in Mexico and a time some months *after I ceased to be in your employ.*"

This covers a period of about a year; *i. e.*, from the summer of 1867, after De Lagnel's return, until the

summer of 1868, the date of the last one of Exall's four letters to Granger, being July 18, 1868. (*Record*, 290.)

Exall proceeds, alluding to Granger and himself, and to an early period of their life at the mines:

> "We saw that if the Company was actually expelled, as we were certain it ultimately would be, we might not and most probably would not be able to secure the property, as it would probably fall into other hands; but that if the Company could be induced voluntarily to abandon the property before matters culminated in an expulsion, or to part with it for a small consideration, we could probably retain the possession and secure the property to ourselves, and due protection, Mr. Granger being an English subject."

Referring to a later period, he says:

> "In my letters to Mr. Garth, treasurer of the Company, I purposely dwelt upon and *exaggerated my necessities and difficulties, and belittled the value of the mines and ores, and gave to the letters a discouraging aspect.*"

And, after alluding to his letter of February 26, 1868, to Granger, he describes the outcome as follows:

> "I remained there some time afterwards, but I waited too long, and the explosion, which I believed to be several months distant, came unexpectedly, and the expulsion and my abrupt departure to save myself from personal harm, and the complete abandonment of everything belonging to the Company, took place as I have stated in my depositions."

This was a most humiliating confession for Exall to make, and it prevents us from believing anything he says, unless corroborated. But the truth of his statement that he exaggerated his necessities and the exigencies of the situation, and belittled the value of the mines and ores, and gave to his letters a discouraging aspect, can be proved to a demonstration. Take, for example,

his letter of October 6, 1867. (*Record*, 274, 275.) Exall says in this letter that he had exhausted all the ore on hand that was worth working. But the mill was running at that time, and they were getting out ore, and continued to get out ore, as the books show, till February of the next year, *without a dollar from New York*. They were not equipped for treating the "rebellious" La Luz, which, he said in this letter, "won't pay to throw in the river." "Amparos," he said, "are not now granted."

But that was false, for, on the next page, we find his application to "the mining deputation of the district of San Ignacio" for an "amparo" for six months for Anyan [Arrayan], Sanz and Talpa, which, as the sequel shows, was successful, for when he was finally forced to leave Tayoltita, none of the mines were subject to denouncement. He never seems to have had any trouble with the mining "deputation" at San Ignacio or Gavilanes, but only with the authorities at Tayoltita and San Dimas, who had nothing to do with granting "amparos," and with their superiors at Durango who refused to afford the necessary protection or even to rebuke such violations of the rights of persons and property as Mora's and Soto's orders of dispossession, or Soto's seizure of the Guadalupe hacienda, or Exall's imprisonment in the pest house by Perez. In that same letter Exall said that he would like to retain Sloane, but was unable to give any guarantee for the payment of his wages. He did retain him, however, and paid him in full a month or two later.

He told Garth that the government had ordered that "all holders and workers of mines must present to the authorities the title deeds of their mines," and that the Prefect in San Dimas had sent for the titles of La Abra Company's mines. But a letter, printed on the same page (*Record*, 274), shows that he had informed the Prefect, nearly a month previously, that he was going in a

few days to Durango, *where the Company's titles were recorded*, and would "get a written statement to that effect." "There is no difficulty," he says, "about authorities, boundaries, or anything else concerning the mines and hacienda (*not even poor ores?*) provided there is money in hand, and *money must be sent.*" We have seen from his letters to Granger, written after the abandonment, that he was so fond of money that he proposed to falsify the accounts in order to obtain more of it than was his due. But he should not have been short of money on October 6, 1867. The Mexican government has retained for sixteen years the evidence by which we now know that he received $1,356 for bullion from the mint at Durango the previous month, and the next succeeding month, nearly a thousand dollars more. (*Record*, 745, third paragraph of stipulation.) The only letter from Granger to Garth in the press-copy book (*Record*, 276) is a short note informing him of a report (which turned out to be unfounded) that Exall, *on this November trip with bullion to Durango*, accompanied by Sloan and two mozos, had been met by a band of robbers, and everything taken from them, "*silver*, mules, arms, &c., leaving them in their underclothing to make their way into the city, about half a day's journey."

Exall said in this same letter of October 6, that he had "neither money, stock nor credit." But in his letter of December 18, 1867 (*Record*, 277), he said that he had *borrowed* $1,492 to pay off Cullins!

The Government's counsel dwells also on Exall's letter of January 24, 1868 (Brief, 161):

> "*Everything had stopped;* no means at home to take steps to save the mines from denouncement; debts right and left and nothing wherewith to pay them. 'What is your intention,' he says. 'Is it to let your interests here go to the dogs? You have

either to do this or send money out to protect them.' (Ex. B, 317.)

"But *as nothing was doing at the mines* (italics Mr. Maury's), what had become of the $17,000? Is it not as clear as noontide that it had no existence save as *the coinage of Exall's brain?*" (Italics Mr. Maury's.)

Exall had left the Company's books and papers at Tayoltita, and, as already observed, he said in his original deposition (*Record*, 31), that he could "not state dates and names with any degree of certainty." But the complainant in this suit brought forward the documentary evidence (retained by the Mexican Government since 1878), which shows that Government's counsel is mistaken when he asserts that "everything had stopped," and that "nothing was doing in the mines." The stipulation, to which reference has so often been made, admits—

"That there are entries in the books of La Abra Company in October, November and December, 1867, and *January, February and March, 1868*, by way of debit and credit, to Calderon, Rabita, Solio, Navidad, Perez, Avalos and other workmen employed at the Company's mines, or to some of them." (*Record*, 745, paragragh 1.)

The books also show, and the Government admits, that in December, 1867, the mill was debited for merchandise $563.09, and—

"That there are entries in said books in October, November and December, 1867, and *January* and *February, 1868*, against *La Abra, La Luz, Arrayan* and *Sanz* mines for fuse, gunpowder or other items." (*Record*, 745, paragraph 2.)

And, as already observed, the entries in "expense account," Exhibit 30, p. 103, printed in Respondent's Evidence, p. 94, show, under date of *February 21, 1868*,

"expenses to *Durango* $16, paid taxes hacienda, $30, mill $20, mercantile $32.50."

Was not Señor Vallarta, Mexican Minister of Foreign Affairs, wise when he instructed Señor Gaona, the Federal district attorney, to make Granger's compensation of $3,500 *contingent upon the entire exoneration of the Mexican government from liability for the award?* (*Record*, 590, ans. to cross-ques. 67.)

The case, as affected by the "newly-discovered evidence," and particularly by Exall's letters, was carefully considered by the House Committee on Foreign Affairs in the 49th Congress, which, after hearing argument on both sides, and examining the letter-press copy book, reported by a majority of ten to three (although admitting the power of Congress to waive the benefit of the treaty) in favor of the claim on the merits and the finality of the award. In regard to Exall's letters the committee said:

> "Superintendent Exall's contradictions of his testimony as revealed in his letters, now produced for the first time, are given great importance, and stress is laid upon them as imputing that his testimony was false and the claims of the Company purely pretentious.
>
> "It should, however, be remembered that Exall was acting for his own interest, and that his letters conformed to what that interest seemed to require. He was a creditor of the Company. He was in Mexico, and needed money, and as an inducement to the Company to send him money he apparently colored the facts he recited in his newly-presented letters under the impulses of the moment, and described conditions to suit his necessities. We can not justly hold the Company responsible for his course any more than we could justly hold a nation responsible for the conduct of a traitor.
>
> "True, his testimony is apparently discredited, but he is dead, and explanations which, if living,

he ought to make, are now impossible. But, did this case rest upon his testimony, it would be nevertheless discredited, and, in our opinion, it should be disregarded; and, *disregarding it, there is an abundance of sound testimony to sustain the award.*" (Rep. No. 3474, H. R., 49th Cong., 1st Sess., p. 5.)

The Umpire and the Award.

The Government has not produced a scintilla of proof showing that any of the evidence on which Sir Edward Thornton based his award was corruptly obtained by or for the Company, or was in fact false. But it has produced the Company's books, which corroborate Mr. Collins' testimony as to the Company's expenditures in Mexico, and entirely overthrow the Government's theory that work had practically stopped at the mines, and that Exall was getting nothing from his mining operations for a long period before the abandonment.

When Sir Edward Thornton consented to serve as Umpire, the President of the United States said in his annual message to Congress:

> "The distinguished representative of Her Britannic Majesty at Washington has kindly consented, with the approval of his government, to assume the arduous and responsible duties of Umpire in this Commission, and to lend the weight of his character and name to such decisions as may not receive the acquiescence of both the arbitrators appointed by the respective governments." (For. Rels., 1873, p. v.)

At the close of the Umpire's labors, the President made the following reference to his services in his annual message to Congress:

> "I am pleased to be able to express the acknowledgments due to Sir Edward Thornton, the Umpire of the Commission, who has given to the consideration of the large number of claims submitted

> to him much time, unwearied patience, and that firmness and intelligence which are well known to belong to the accomplished representative of Great Britain, and which are likewise recognized by the representative in this country of the Republic of Mexico." (For. Rels., 1876, p. viii.)

The qualifications of Sir Edward for the arduous work that was devolved upon him by Señor Zamacona's rejection of nearly all the claims of citizens of the United States, were exceptional. After graduating at Cambridge in 1840, he had been trained in the English fashion for the diplomatic service, in which his father had been eminent. He was attaché *in Mexico* in 1845, and secretary of legation in 1851 in the same country. After serving as secretary to the special mission to the river Platte, under the late Sir Charles Hotham, from April, 1852, to October, 1853, he became chargé d'affaires and consul-general in New Grenada, and was subsequently transferred to Uruguay. In 1859 he was appointed minister to the Argentine Confederation, and in 1865 he was sent on a special mission to Brazil, where he resided later as minister at the court of the emperor. In September, 1867, he was appointed minister to Portugal, but before he could enter on his duties, he was transferred in December of the same year to Washington. He was of the Queen's privy council and a member of the Joint High Commission for the settlement of the "Alabama" claims in 1871. He was a D. C. L. of Oxford (1877) and L. L. D. of Harvard (1879). He was arbitrator of the Ontario boundaries in 1878, and transferred to St. Petersburg as Ambassador in 1881, and to Turkey in 1884, and on January 1, 1887, he was retired with a pension.

When he was appointed Umpire (1873) he had been in the diplomatic service for twenty years in Spanish American countries—much of the time *in Mexico*—and

in the Brazilian empire. He was a thorough Spanish scholar, and, what was still of more importance, thoroughly acquainted with the political and social conditions prevailing in Spanish America, and with the idiosyncrasies and character of Spanish Americans.

It appears from an analysis of the Umpire's award that he found from the evidence as follows: *

(1) That La Abra Silver Mining Company was entitled to be considered a corporation or company of citizens of the United States, in accordance with the terms of the convention of July 4, 1868, having been duly chartered in conformity with the laws of the State of New York. (Certification of incorporation, *Record*, 24, Doc. No. 6.)

(2) That the enterprise on which the said Company entered of purchasing, denouncing, and working certain mines in the State of Durango in Mexico, was a serious and honest business transaction on their part, and that there was nothing rash, deceitful or fraudulent in it, but that it was engaged in with the sole intention of carrying out legitimate mining operations. (*Record*, 148, 167, 175, 665, 666.)

(3) That prior to the purchase of its mines by the said Company the Mexican government issued proclamations inviting foreigners to bring their capital into Mexico and promising them certain advantages and full protection. (*Record*, 35, 42, 57, 84, 87, 192, 193.)

(4) That the local authorities at Tayoltita and San Dimas, far from affording to the claimants that protection and assistance which had been promised them, and to which they were entitled by treaty,

* We attach the references to the evidence which justifies each of the findings of the Umpire.

not only showed themselves a spirit of bitter hostility to the Company, but encouraged their countrymen who were employed by the claimants in similar behavior, and even frightened them into refusing to work for their American employers. (See Arts. III, VIII, and XIV of the Treaty of 1831, revived by Art. XVII of the Treaty of Guadalupe Hidalgo, and in force when the Company was organized and while it was at work in Mexico; and for references to and extracts from the testimony showing the hostility and aggressions of the authorities, see *supra*, 3.) *

(5) That the superintendent of the mines took such steps as he could to obtain protection from these authorities, and, finding his efforts in vain, he appealed, through a lawyer of high character, to the highest authorities in the State, who declined to interfere in the matter. (*Supra*, 188–193; 311–316; *Record*, 82, 83, 89.) *

(6) That in presence of such opposition to their efforts the Company was compelled to abandon its enterprise and property at Tayoltita. (*Record*, 31, 32, 48, 49, 60, 61, 68, 69, 70, 83, 87, 119, 120, 128, 129, 152, 154–158, 655, 656, 712, 713.) *

(7) That the Company invested in its Mexican enterprise the sum of $341,791.06, and that in addition thereto it derived the sum of $17,000 from reduced ores. (*Record*, 38, 39, 156.)

(8) That the Company had extracted from the mines and deposited at the mill 1,000 tons of ore worth an average of $100 per ton. (*Supra*, 76, 77.)

* Extracts from the evidence will be found throughout subdivision IX *supra*, from p. 179 to the close of the argument on the facts.

(9) And that as matter of law the true measure of damages was not the alleged value of the mines, or what they might have produced, as claimed by the Company in its memorial, *i. e.*, $3,000,000, but the actual amount of the Company's expenditures, with interest, and the value of the ores which had been mined and were on hand at the time of the abandonment.

Upon the whole evidence the appellant confidently submits to the court—

(1) That the evidence before the Umpire justified his award.

(2) That the Government has not proved that the evidence on which the award was founded, or any material part of the same, was obtained by fraud, effectuated by means of false swearing or other false and fraudulent practices on the part of the said La Abra Company, its agents, attorneys, or assigns.

(3) That the said award was not obtained in whole or part by means of false swearing or other false and fraudulent practices on the part of the said La Abra Company, its agents, attorneys, or assigns.

(4) That the court should reverse the decree of the Court of Claims and direct that the portion of the award remaining undistributed be paid to La Abra Company or its assigns.

If this court does not review the facts because it decides that the act is unconstitutional, or that it has no jurisdiction to entertain the appeal, then the cause should be remanded with instructions to dismiss the bill.

Or if the court holds that the court below should have applied the ordinary principles of equity to this proceeding, and that if so applied the complainant would have been without equity, then the cause should be remanded with instructions to dismiss the bill.

CRAMMOND KENNEDY,
Solicitor and of Counsel for Appellant.

J. M. WILSON,
JNO. C. FAY,
E. I. RENICK,
Of Counsel.

NOVEMBER 21, 1898.

APPENDICES.

APPENDIX I.

(15 Stats., 679.)

Convention between the United States of America and the Republic of Mexico for the Adjustment of Claims.

Concluded July 4, 1868; proclaimed February 1, 1869.

By the President of the United States of America.

A Proclamation.

Whereas, a convention between the United States of America and the Republic of Mexico, providing for the adjustment of the claims of citizens of either country against the other, was concluded and signed by their respective plenipotentiaries, at the city of Washington, on the fourth day of July, in the year of our Lord one thousand eight hundred and sixty-eight, which convention, being in the English and Spanish languages, is, word for word, as follows:

Whereas, it is desirable to maintain and increase the friendly feelings between the United States and the Mexican Republic, and so to strengthen the system and principles of republican government on the American continent; and whereas, since the signature of the treaty of Guadalupe Hidalgo, of the 2d of February, 1848, claims and complaints have been made by citizens of the United States, on account of injuries to their persons and their property by authorities of that republic, and similar

claims and complaints have been made on account of injuries to the persons and property of Mexican citizens by authorities of the United States; the President of the United States of America and the President of the Mexican Republic have resolved to conclude a convention for the adjustment of the said claims and complaints, and have named as their plenipotentiaries—the President of the United States, William H. Seward, Secretary of State, and the President of the Mexican Republic, Matias Romero, accredited as envoy extraordinary and minister plenipotentiary of the Mexican Republic to the United States, who, after having communicated to each other their respective full powers, found in good and due form, have agreed to the following articles:

ARTICLE I.

All claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the government of the Mexican Republic, arising from injuries to their persons or property by authorities of the Mexican Republic, and all claims on the part of corporations, companies, or private individuals, citizens of the Mexican Republic, upon the government of the United States, arising from injuries to their persons or property by authorities of the United States, which may have been presented to either government for its interposition with the other since the signature of the treaty of Guadalupe Hidalgo between the United States and the Mexican Republic of the 2d of February, 1848, and which yet remain unsettled, as well as any other such claims which may be presented within the time hereinafter specified, shall be referred to two Commissioners, one to be appointed by the President of the United States, by and with the advice and consent of the Senate, and one by the President of the Mexican Republic. In case of the

death, absence, or incapacity of either Commissioner, or in the event of either Commissioner omitting or ceasing to act as such, the President of the United States, or the President of the Mexican Republic, respectively, shall forthwith name another person to act as Commissioner in the place or stead of the Commissioner originally named.

The Commissioners so named shall meet at Washington within six months after the exchange of the ratifications of this convention, and shall, before proceeding to business, make and subscribe a solemn declaration that they will impartially and carefully examine and decide, to the best of their judgment, and according to public law, justice, and equity, without fear, favor, or affection to their own country, upon all such claims above specified as shall be laid before them on the part of the governments of the United States and of the Mexican Republic, respectively; and such declaration shall be entered on the record of their proceedings.

The Commissioners shall then name some third person to act as an Umpire in any case or cases on which they may themselves differ in opinion. If they should not be able to agree upon the name of such third person, they shall each name a person, and in each and every case in which the Commissioners may differ in opinion as to the decision which they ought to give, it shall be determined by lot which of the two persons so named shall be Umpire in that particular case. The person or persons so to be chosen to be Umpire shall, before proceeding to act as such in any case, make and subscribe a solemn declaration in a form similar to that which shall already have been made and subscribed by the Commissioners, which shall be entered on the record of their proceedings. In the event of the death, absence, or incapacity of such person or persons, or of his or their

omitting, or declining, or ceasing to act as such Umpire, another and different person shall be named, as aforesaid, to act as such Umpire, in the place of the person so originally named, as aforesaid, and shall make and subscribe such declaration as aforesaid.

ARTICLE II.

The Commissioners shall then conjointly proceed to the investigation and decision of the claims which shall be presented to their notice, in such order and in such manner as they may conjointly think proper, but upon such evidence or information only as shall be furnished by or on behalf of their respective governments. They shall be bound to receive and peruse all written documents or statements which may be presented to them by or on behalf of their respective governments in support of or in answer to any claim, and to hear, if required, one person on each side on behalf of each government on each and every separate claim. Should they fail to agree in opinion upon any individual claim, they shall call to their assistance the Umpire whom they may have agreed to name, or who may be determined by lot, as the case may be; and such Umpire, after having examined the evidence adduced for and against the claim, and after having heard, if required, one person on each side as aforesaid, and consulted with the Commissioners, shall decide thereupon finally and without appeal. The decision of the Commissioners and of the Umpire shall be given upon each claim in writing, shall designate whether any sum which may be allowed shall be payable in gold or in the currency of the United States, and shall be signed by them respectively. It shall be competent for each government to name one person to attend the Commissioners as agent on its behalf, to present and support claims on its behalf, and to answer claims made

upon it, and to represent it generally in all matters connected with the investigation and decision thereof.

The President of the United States of America and the President of the Mexican Republic hereby solemnly and sincerely engage to consider the decision of the Commissioners conjointly or of the Umpire, as the case may be, as absolutely final and conclusive upon each claim decided upon by them or him respectively, and to give full effect to such decisions without any objection, evasion, or delay whatsoever.

It is agreed that no claim arising out of a transaction of a date prior to the 2d of February, 1848, shall be admissible under this Convention.

ARTICLE III.

Every claim shall be presented to the Commissioners within eight months from the day of their first meeting, unless in any case where reasons for delay shall be established to the satisfaction of the Commissioners, or of the Umpire in the event of the Commissioners differing in opinion thereupon, and then and in any such case the period for presenting the claim may be extended to any time not exceeding three months longer.

The Commissioners shall be bound to examine and decide upon every claim within two years and six months from the day of their first meeting. It shall be competent for the Commissioners conjointly, or for the Umpire if they differ, to decide in each case whether any claim has or has not been duly made, preferred, and laid before them, either wholly or to any and what extent, according to the true intent and meaning of this Convention.

ARTICLE IV.

When decisions shall have been made by the Commissioners and the Arbiter in every case which shall

have been laid before them, the total amount awarded in all the cases decided in favor of the citizens of the one party shall be deducted from the total amount awarded to the citizens of the other party, and the balance, to the amount of three hundred thousand dollars, shall be paid at the city of Mexico, or at the city of Washington, in gold or its equivalent, within twelve months from the close of the Commission, to the government in favor of whose citizens the greater amount may have been awarded, without interest or any other deduction than that specified in Article VI of this convention. The residue of the said balance shall be paid in annual installments to an amount not exceeding three hundred thousand dollars in gold or its equivalent, in any one year until the whole shall have been paid.

ARTICLE V.

The high contracting parties agree to consider the result of the proceedings of this Commission as a full perfect, and final settlement of every claim upon either government arising out of any transaction of a date prior to the exchange of the ratifications of the present convention; and further engage that every such claim, whether or not the same may have been presented to the notice of, made, preferred, or laid before the said Commission, shall, from and after the conclusion of the proceedings of the said Commission, be considered and treated as finally settled, barred, and thenceforth inadmissible.

ARTICLE VI.

The Commissioners and the Umpire shall keep an accurate record and correct minutes of their proceedings, with the dates. For that purpose they shall appoint two secretaries versed in the language of both countries to

assist them in the transaction of the business of the Commission. Each government shall pay to its Commissioner an amount of salary not exceeding forty-five hundred dollars a year in the currency of the United States, which amount shall be the same for both governments. The amount of compensation to be paid to the Umpire shall be determined by mutual consent at the close of the Commission, but necessary and reasonable advances may be made by each government upon the joint recommendation of the Commission. The salary of the secretaries shall not exceed the sum of twenty-five hundred dollars a year in the currency of the United States. The whole expenses of the Commission, including contingent expenses, shall be defrayed by a ratable deduction on the amount of the sums awarded by the Commission, provided always, that such deductions shall not exceed five per cent. on the sums so awarded. The deficiency, if any, shall be defrayed in moieties by the two governments.

ARTICLE VII.

The present convention shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof, and by the President of the Mexican Republic, with the approbation of the Congress of that Republic, and the ratifications shall be exchanged at Washington within nine months from the date hereof, or sooner if possible.

In witness whereof the respective plenipotentiaries have signed the same and have affixed thereto the seals of their arms.

Done at Washington the fourth day of July, in the year of our Lord one thousand eight hundred and sixty-eight.

WILLIAM H. SEWARD. [L. S.]
M. ROMERO. [L. S.]

And whereas the said convention has been duly ratified on both parts, and the respective ratifications of the same have this day been exchanged:

Now, therefore, be it known that I, ANDREW JOHNSON, President of the United States of America, have caused the said convention to be made public, to the end that the same, and every clause and article thereof, may be observed and fulfilled with good faith by the United States and the citizens thereof.

In testimony whereof I have hereunto set my hand, and caused the seal of the United States to be affixed.

Done at the city of Washington this first day of February, in the year of our Lord one thousand
[SEAL.] eight hundred and sixty-nine, and of the Independence of the United States of America the ninety-third.

ANDREW JOHNSON.

By the President:

WILLIAM H. SEWARD,

Secretary of State.

APPENDIX I*a*.

(20 Stats., 144.)

CHAP. 262.—**An act to provide for the distribution of the awards made under the convention between the United States of America and the Republic of Mexico concluded on the fourth day of July, eighteen hundred and sixty-eight.**

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of State be, and he is hereby, authorized and required to receive any and all moneys which may be paid by the Mexican Republic under and in pursuance of the conventions between the United States and the Mexican Republic for the adjustment of claims, concluded July fourth, eighteen hundred and sixty-eight, and April twenty-ninth, eighteen hundred and seventy-six; and whenever, and as often as, any installments shall have been paid by the Mexican Republic on account of said awards, to distribute the moneys so received in ratable proportions among the corporations, companies, or private individuals respectively in whose favor awards have been made by said Commissioners, or by the Umpires, or to their legal representatives or assigns, except as in this act otherwise limited or provided, according to the proportion which their respective awards shall bear to the whole amount of such moneys then held by him, and to pay the same, without other charge or deduction than is hereinafter provided, to the parties respectively entitled thereto. And in making such distribution and payment, due regard shall be had to the value at the time of such distribution of the respective currencies in which the said awards are made payable;

and the proportionate amount of any award of which by its terms the United States is entitled to retain a part shall be deducted from the payment to be made on such award, and shall be paid into the Treasury of the United States as a part of the unappropriated money in the Treasury.

SEC. 2. That out of any moneys in the Treasury not otherwise appropriated, a sufficient sum is hereby appropriated to enable the Secretary of the Treasury to pay to the Secretary of State of the United States, in gold or its equivalent, the equivalent of fifty thousand five hundred and twenty-eight dollars and fifty-seven cents in Mexican gold dollars, and ten thousand five hundred and fifty-nine dollars and sixty-seven cents in American gold coin, and eighty-nine thousand four hundred and ten dollars and seventeen cents in United States currency, said sums being the aggregate in said currencies respectively of the awards made under the said convention of July fourth, eighteen hundred and sixty-eight, in favor of citizens of the Mexican Republic against the United States, and having been deducted from the amount awarded in favor of citizens of the United States, and payable by Mexico, in accordance with article four of the said treaty; and that said sums, when paid to the Secretary of State, as aforesaid, shall be regarded as part of the awards made under the said treaty, to be paid or distributed as herein provided.

SEC. 3. That out of the payments and installments received from Mexico, as aforesaid, on account of said awards, and out of the moneys which shall be received by the Secretary of State under the provisions of this act, the Secretary of State shall, when and as the same shall be received and paid, and before any payment to claimants, deduct therefrom and retain a sum not to exceed five per centum of said moneys awarded to citi-

zens of the United States, until the aggregate of the amounts so deducted and retained shall equal the sum of one hundred and fourteen thousand nine hundred and forty-eight dollars and seventy-four cents, being the amount of the expenses of the Commission, including contingent expenses paid by the United States in accordance with article six of the treaty, as ascertained and determined in pursuance of the provisions of the said treaty; which said sums, when and as the same are deducted and retained, shall be, by the Secretary of State, transmitted to the Secretary of the Treasury, and passed to the account of, and be regarded as, unappropriated money in the Treasury.

SEC. 4. That in the payment of money, in virtue of this act, to any corporation, company, or private individual, the Secretary of State shall first deduct and retain or make reservation of such sums of money, if any, as may be due to the United States from any corporation, company, or private individual in whose favor awards shall have been made under the said convention.

SEC. 5. And whereas the Government of Mexico has called the attention of the Government of the United States to the claims hereinafter named with a view to a rehearing, therefore be it enacted, that the President of the United States be and he is hereby requested to investigate any charges of fraud presented by the Mexican Government as to the cases hereinafter named, and if he shall be of the opinion that the honor of the United States, the principles of public law or considerations of justice and equity, require that the awards in the cases of Benjamin Weil and La Abra Silver Mining Company, or either of them, should be opened and the cases retried, it shall be lawful for him to withhold payment of said awards, or either of them until such case or cases shall be retried and decided in such manner as the govern-

ments of the United States and Mexico may agree, or until Congress shall otherwise direct. And in case of such retrial and decision, any moneys paid or to be paid by the Republic of Mexico in respect of said awards respectively, shall be held to abide the event, and shall be disposed of accordingly; and the said present awards shall be set aside, modified or affirmed as may be determined on such retrial: *Provided*, That nothing herein shall be construed as an expression of any opinion of Congress in respect to the character of said claims, or either of them.

Approved, June 18, 1878.

APPENDIX I*b*.

(27 Stats., 409.)

CHAP. 14.—An act to amend and enlarge the act approved June eighteenth, eighteen hundred and seventy-eight, entitled "An act to provide for the distribution of the awards made under the convention between the United States of America and the Republic of Mexico, concluded on the fourth day of July, eighteen hundred and sixty-eight."

Whereas the Secretary of State, after investigating the charge of fraud presented by the Mexican Government as to the case of La Abra Silver Mining Company, has heretofore reported that the "honor of the United States requires" that said case "should be further investigated by the United States, to ascertain whether this government has been made the means of enforcing upon a friendly power claims of our citizens based upon or exaggerated by fraud," but that "the executive government is not furnished with means of instituting and pursuing methods of investigation which can coerce the production of evidence or compel the examination of parties and witnesses," and that "the authority for such an investigation must proceed from Congress," and

Whereas the President of the United States has transmitted to Congress the recommendation of the Secretary of State that said case "be referred to the Court of Claims, or such other court as may be deemed proper, in order that the charge of fraud made in relation to said claim may be fully investigated:" Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in further execution of the purpose of said act, the Attor-

ney-General of the United States be, and he is hereby, authorized and directed to bring a suit or suits in the name of the United States in the Court of Claims against La Abra Silver Mining Company, its successors and assigns, and all persons making any claim to the award, or any part thereof, in this act mentioned, to determine whether the award made by the United States and Mexican Mixed Commission, in respect to the claim of the said La Abra Silver Mining Company, was obtained, as to the whole sum included therein, or as to any part thereof, by fraud effectuated by means of false swearing or other false and fraudulent practices on the part of the said La Abra Silver Mining Company, or its agents, attorneys, or assigns; and, in case it be so determined, to bar and foreclose all claim in law or equity on the part of said La Abra Silver Mining Company, its legal representatives or assigns, to the money, or any such part thereof, received from the Republic of Mexico for or on account of such award; and any defendant to such suit who can not be found in the District of Columbia shall be notified and required to appear in such suit by publication as the court may direct, in accordance with law, as applicable to cases in equity.

SEC. 2. That full jurisdiction is hereby conferred on the Court of Claims to hear and determine such suit and to make all interlocutory and final decrees therein, as the evidence may warrant, according to the principles of equity and justice, and to enforce the same by injunction or any proper final process, and in all respects to proceed in said cause according to law and the rules of said court, so far as the same are applicable. And the Secretary of State shall certify to the said court copies of all proofs admitted by the said Mixed Commission on the

original trial of said claim, and the said court shall receive and consider the same in connection with such competent evidence as may be offered by either party to said suit.

SEC. 3. That an appeal from any final decision in such cause to the Supreme Court of the United States may be taken by either party within ninety days from the rendition of such final decree, under the rules of practice which govern appeals from said court; and the Supreme Court of the United States is hereby authorized to take jurisdiction thereof and decide the same.

SEC. 4. That in case it shall be finally adjudged in said cause that the award made by said Mixed Commission, so far as it relates to the claim of La Abra Silver Mining Company, was obtained through fraud effectuated by means of false swearing, or other false and fraudulent practices of said Company or its assigns, or by their procurement, and that the said La Abra Silver Mining Company, its legal representatives or assigns, be barred and foreclosed of all claim to the money or any part thereof so paid by the Republic of Mexico for or on account of such award, the President of the United States is hereby authorized to return to said Government any money paid by the Government of Mexico on account of said award, remaining in the custody of the United States, that has not been heretofore distributed to said La Abra Mining Company or its successors and assigns, which such court shall decide that such persons are not entitled, in justice and equity, to receive out of said fund.

SEC. 5. That, during the pendency of said suit and until the same is decided, it shall not be lawful for the Secretary of State to make any further payments out of said fund, on account of said award, to La Abra Silver

Mining Company, or its legal representatives, attorneys, or assigns; and in case it shall be finally adjudged in said cause either in the Court of Claims or in the Supreme Court of the United States that the award made by said Mixed Commission, so far as it relates to the claim of La Abra Silver Mining Company, or any definable and severable part thereof, was not obtained through fraud as aforesaid, then the Secretary of State shall proceed to distribute so much of the said award as shall be found not so obtained through fraud, or the proceeds thereof remaining for distribution, if any, to the persons entitled thereto.

Approved, December 28, 1892.

APPENDIX II.

Mr. Evarts' Report.

46TH CONGRESS, 2d Session. } SENATE. { Ex. Doc. No. 150.

MESSAGE from the PRESIDENT OF THE UNITED STATES, communicating, in compliance with a resolution of the Senate of the 27th of February last, information concerning certain awards made by the late United States and Mexican Commission.

APRIL 16, 1880.—Referred to the Committee on Foreign Relations and ordered to be printed.

To the Senate of the United States:

In response to the resolution of the Senate of the 27th of February last, concerning the action had by the Executive with respect to the investigation of certain cases in which awards were made by the late United States and Mexican Commission, I transmit herewith a report of the Secretary of State, to whom the matter was referred.

R. B. HAYES.

WASHINGTON, *April* 15, 1880.

DEPARTMENT OF STATE,
Washington, April 13, 1880.

To the PRESIDENT:

The Secretary of State, to whom was referred the following resolution of the Senate of the 27th of February, 1880—

"*Resolved*, That the President be requested, if in his opinion not inconsistent with the public service,

to inform the Senate what action, if any, has been taken by him under authority of section 5 of the act approved June 18, 1878, entitled 'An act to provide for the distribution of the awards made under the convention between the United States of America and the Republic of Mexico, concluded on the 4th day of July, 1868,' and of the grounds of such action, and what further action, if any, the honor of the United States may, in his opinion, require to be taken in the premises"—

Has the honor to report.

The act passed by Congress "to provide for the distribution of the awards made under the convention between the United States of America and the Republic of Mexico, concluded on the 4th day of July, 1868," contained the following section:

"SEC. 5. And whereas the Government of Mexico has called the attention of the Government of the United States to the claims hereinafter named with a view to a rehearing; therefore, be it enacted that the President of the United States be, and he is hereby, requested to investigate any charges of fraud presented by the Mexican Government as to the cases hereinafter named, and if he shall be of the opinion that the honor of the United States, the principles of public law, or considerations of justice and equity require that the awards in the cases of Benjamin Weil and La Abra Silver Mining Company, or either of them, should be opened and the cases retried, it shall be lawful for him to withhold payment of said awards, or either of them, until such case or cases shall be retried and decided in such manner as the Governments of the United States and Mexico may agree, or until Congress shall otherwise direct; and, in case of such retrial and decision, any moneys paid or to be paid by the Republic of Mexico in respect of said awards, respectively, shall be held to abide the event, and shall be dis-

posed of accordingly; and the said present awards shall be set aside, modified, or affirmed, as may be determined on such retrial: *Provided*, That nothing herein shall be construed as an expression of any opinion of Congress in respect to the character of said claims, or either of them."

It having been referred by you to the Department of State to institute the investigation required by this action, I gave the subject the most careful examination. I reviewed the proceedings of the Commission, including the testimony originally submitted, the arguments made by the counsel both for the Republic of Mexico and the United States, the opinions of the members of the Commission, and the final decision of the Umpire. I considered the representations of the Mexican Government, as set forth in its diplomatic communications to this Department, and subjected to patient scrutiny the supplemental evidence by which those representations had been supported. In addition to this, I heard counsel both for the Mexican Government and the parties interested in these awards.

The most impressive complaint of the Mexican Government in the La Abra case bore upon the award of damages as fraudulently exaggerated.

In the Weil case, the Government of Mexico asserts that no such case had ever had any real existence; that there never was any such property as is alleged to have been seized; that the parties claimant never owned, directly or as agents, any such property; that the seizure of the property is in all its details a pure fiction, and that the evidence by which the whole claim is established is spurious and corrupt.

Upon these complaints, and the examination given to them as above set forth, on the 8th of August last I re-

ported to you my conclusions as to the proper disposition of the matter by the executive government, as follows:

"*First.* I am of opinion that, as between the United States and Mexico, the latter government has no right to complain of the conduct of these claims before the tribunal of Commissioners and Umpire provided by the convention, or of the judgments given thereupon, so far as the integrity of the tribunal is concerned, the regularity of the proceedings, the full opportunity, in time and after notice, to meet the case of the respective claimants, and the free and deliberate choice exercised by Mexico as to the methods, the measure, and the means of the defense against the same.

I conclude, therefore, that neither the principles of public law nor considerations of justice or equity require or permit, as between the United States and Mexico, that the awards in these cases should be opened and the cases retried before a new international tribunal, or under any new convention or negotiation respecting the same between the United States and Mexico.

Second. I am, however, of opinion that the matters brought to the attention of this government on the part of Mexico do bring into grave doubt the substantial integrity of the claim of Benjamin Weil, and the sincerity of the evidence as to the measure of damages insisted upon and accorded in the case of the La Abra Silver Mining Company, and that the honor of the United States does require that these two cases should be further investigated by the United States to ascertain whether this government has been made the means of enforcing against a friendly power claims of our citizens based upon or exaggerated by fraud.

If such further investigation should remove the doubts which have been fairly raised upon the representations of Mexico, the honor of the United States will have been completely maintained. If, on the other hand, the claimants shall fail in re-

moving these doubts, or they should be replaced by certain condemnation, the honor of the United States will be vindicated by such measures as may then be dictated.

Third. The executive government is not furnished with the means of instituting and pursuing methods of investigation which can coerce the production of evidence or compel the examination of parties and witnesses. The authority for such an investigation must proceed from Congress. I would advise, therefore, that the proofs and the conclusions you shall come to thereon, if adverse to the immediate payment on these awards of the installments received from Mexico, be laid before Congress for the exercise of their plenary authority in the matter.

Fourth. It may be that, as the main imputation in the case of the La Abra Silver Mining Company is of fraudulent exaggeration of the claim in its measure of damages, it may consist with a proper reservation of further investigation in this case to make the distribution of the installments in hand.

I have this subordinate consideration still under examination, and, should you entertain this distinction, will submit my further conclusions on this point."

These conclusions having been approved by you, and the point reserved for further consideration in the La Abra case having again been referred to me, on the 3d of September last I reported to you my conclusions upon the same, as follows:

"The parties interested in the case of the La Abra Mining Company having desired from you a further consideration of the point reserved in my former statement to you of my views in that case, and the matter having been referred to me to that end, I respectfully submit my conclusion on that point.

1. Upon a renewed examination of the matter, as laid before me by the Mexican Government, I am

confirmed in the opinion that the proper limits of the further consideration, which the honor of the government should prompt it to give to this award, should confine the investigation to the question of a fraudulent exaggeration of the claim by the parties before the Commission to which, under the provision of the convention, it was presented by this government.

2. Upon a careful estimate as to any probable or just reduction of the claim from further investigation, should Congress institute it, and under a sense of the obligation of the executive government to avoid any present deprivation of right which does not seem necessary to ultimate results, I am of opinion that its distributive share of the installments thus far received from Mexico may properly be paid to the claimant, reserving the question as to later installments.

If this conclusion should receive your approval, the payment can be made upon the verification at the Department of State of the rightful parties to receive it."

This latter conclusion having also received your approval, and the results stated in both these reports having been communicated both to the Mexican Government and the claimants, the payment was made upon the La Abra award of the distributive share of the installments then in hand, and payment was withheld of the distributive share of such installments upon the Weil award.

The parties interested in these awards have from time to time preferred requests for a renewed consideration by the Executive of the questions arising for his determination under the act of Congress of June 18, 1878, and have particularly insisted that, in deciding against opening these awards diplomatically and re-examining them by a new international commission, the whole dis-

cretion vested in the Executive as a part of the treaty-making power and under the special provision of the act of Congress was exhausted, and that the payments should be no longer suspended in respect to these cases, or either of them. A solicitous attention to the rights of the claimants and the duty of the Executive in the premises has confirmed me in the opinion that Congress should determine whether "the honor of the United States" requires any further investigation in these cases, or either of them, and provide the efficient means of such further investigation, if thought necessary.

In the conclusions to which I came, and which I had the honor to submit to your examination, I was principally governed by the following considerations:

1. In the complaints of the Mexican Government there is not the slightest impeachment, express or implied, of the character or composition of the Commission, of its methods of procedure, or of the entire regularity and integrity of its actual proceedings. It was composed of able and eminent men, enjoying the full confidence of the governments by whom they were respectively appointed, and the Umpire selected, Sir Edward Thornton, was pre-eminently fitted for his laborious and responsible duties by his long diplomatic experience, his recognized ability, his high character, and his special knowledge of the two countries whose citizens and governments were interested in the arbitration.

2. Before this Commission the government of Mexico had full opportunity and ample time to present its defense, both in evidence and argument, against any claim that was submitted. In the La Abra case a large amount of testimony was taken on both sides, the comparison and valuation of which was within the power of the Commission, and the opinion of the Umpire shows that it was carefully considered.

In the Weil case it is true that the Mexican government submitted no testimony, and that the case was decided upon the evidence offered by the claimants. But the Mexican Commissioner explicitly declined the offer of further time to produce such testimony, although he professed that his government had such in possession, saying upon the trial:

> "There is in the present case the still more serious consideration that there is sufficient evidence upon which to judge of the claim, and that by opening the door to new testimony it would only serve to show the claimant wherein the edifice which he had erected upon his imagination was weak, and by enlightening him how to crown his intrigue by new efforts, which, although they would not change the aspect of the case, might lead him to confirm it."

3. The treaty under the provisions of which the Commission was appointed was explicit in recognition of the finality of its action. By Article II of that convention, the two governments bound themselves to consider the decisions of the Commissioners and of the Umpire as absolutely final and conclusive, and to give full effect to such decisions without any objection, evasion, or delay whatsoever; and, by the fifth article, the high contracting parties agree to consider the result of the proceedings of the Commission as a full, perfect, and final settlement of every claim upon either government arising from the transactions prior to the exchange of ratifications thereof.

4. Aside from this special provision of the finality of the decision of the Commission, in the very act of its creation, it would seem impossible to review and retry any individual case without opening the door to other reclamations of the same sort. In addition to these cases, with the result of which the Mexican Government is dissatisfied, there are many others which failed of prepara-

tion in time, which were rejected on principles not always acquiesced in by those interested, and some in which the claimants deemed the awards very insufficient. The adherence of the Government of the United States to the strict letter of its convention that the decision of the Commissioners should be absolutely final in every case, and a complete bar to any claim arising from transactions prior to its ratification, has hitherto prevented any effort on the part of this Government to renew such discussion in favor of its citizens. But if it be once admitted that for any reason short of an impeachment of the integrity of the Commission its proceedings can be reopened for review and its decisions for reversal, there will not be wanting numerous urgent appeals to the justice and sympathy of the Government to extend this measure of relief to many who think that their claims have been erroneously estimated or rejected.

Lastly. The principle of the settlement of international differences by arbitral commissions is of such deep and wide-reaching interest to civilization, and the value of such arbitration depends so essentially upon the certainty and finality of its decision, that no government should lightly weaken its influence or diminish its consideration by making its action the subject of renewed discussion. It is only in extreme cases, where the Commission is itself charged with corruption or where it has clearly exceeded its powers in deciding matters not submitted to its judgment, that prompt and cheerful acquiescence should not be rendered to its action. No such charge is here suggested. It may be true that in this or that instance more adequate justice might have been rendered. The methods and processes of such tribunals, which in time it may be confidently hoped will be improved and perfected, are not yet so complete as to eliminate much oppor-

tunity of error. But the results of such an arbitration, covering, as this did, large, complicated, and numerous transactions, deciding not upon oral testimony winnowed by cross-examination, but upon the contradiction of vague affidavits, can not be fairly judged by the apparent errors of this or that individual case. There is, probably, no just ground for saying that the aggregate of the awards against Mexico more than equaled the just claims of our citizens, and much complaint has been made that such aggregate falls quite short of them. But the awards made by this Commission were something more than the settlement of mere private claims—it was the adjustment of long-standing national differences. And if in the result more or less was added to or taken from particular awards, still if on the whole a fair and just balance has been struck, if considering all that has been given and all that has been refused the examination has been careful and the judgment impartial, it is the interest and the duty of governments to maintain it.

While these considerations led to the conclusion that these cases ought not to be made the subject of a new international commission, I was yet of opinion that "the honor of the United States" was concerned to inquire whether in these cases, submitted by this Government to the Commission, its confidence had been seriously abused, and the Government of Mexico, acting in good faith in accepting a friendly arbitration, had been subjected to heavy pecuniary imposition by fraud and perjury in the maintenance of these claims, or either of them, before the Commission. In furtherance, however, of this opinion, it seemed to me apparent that the Executive discretion under the act of Congress could extend no further than to withhold further payments on the awards until Congress should, by its plenary authority, decide whether such an investigation should be made, and should provide an

adequate procedure for its conduct, and prescribe the consequences which should follow from its results.

Unless Congress should now make this disposition of the matter, and furnish thereby definite instructions to the Department to reserve further payments upon these awards till the conclusion of such investigation, and to take such further order with the same thereafter as Congress might direct, it would appear to be the duty of the Executive to accept these awards as no longer open to reconsideration, and proceed in the payment of the same *pro rata* with all other awards under the convention.

WM. M. EVARTS.

APPENDIX III.

Charles B. Dahlgren's examination by a subcommittee of the Senate Committee on Foreign Relations, February 1, 2, 8, and 9, 1889.

[From Report No. 2705, Part 2—Views of Minority—50th Cong., 2d Sess., pp. 54-66.]

The references are to the appendix of the majority report, in which Dahlgren's testimony is printed—pp. 643–740.

In availing itself of the opportunity afforded by the Senate to show that La Abra award should be reopened, the Mexican Government called but one of the witnesses whose depositions had been filed with the Joint Commission. This was Captain Charles B. Dahlgren, whose deposition on behalf of the Company had been taken at Mazatlan before United States Consul Sisson on the 18th of September, 1872. Five years afterwards—in November, 1877—Captain Dahlgren was put into communication with Mr. Robert B. Lines by Mr. Alfred A. Green, who, it will be remembered, had been sent to Mexico by General Slaughter, under his contract with the Mexican Government, "for the purpose of securing testimony in proof of the fraudulent character of said claim." Green met Dahlgren in San Francisco, and made a statement to him, some account of which will be found in Dahlgren's testimony before the subcommittee (*ibid.*, pp. 712–715). After his interview with Green, Dahlgren wrote the following letter, which has been printed as part of the "new evidence offered by Mexico" (Ex. Doc. 103, p. 285), and may be found in the appendix, p. 644:

"SAN FRANCISCO, CAL'A, *Nov.* 12, 1877.

Mr. ROBERT LYONS,
U. S. Senate P. O., Washington:

SIR: I have good reasons for knowing that the testimony under my signature, as offered by A. W. Adams in the La Abra case or claim, has been perverted, and is therefore fraudulent, *and* should be treated as such.

My testimony was taken in rough notes *and* left for him to copy or fill in over my signature on a clean sheet, as I was called off on important business.

I know now that said testimony has been perverted *and* by said A. W. Adams.

Very truly,

C. B. DAHLGREN."

"My address here is: Capt. C. B. Dahlgren, Pacific Refining *and* Bullion Exchange, cor. Brannan 7th, S. F.

P. S. I understand said A. W. Adams boasted he had obtained my signature by the use of a 'good round sum of gold.' Advise me how I can bring him before a court to substantiate said statement.

C. B. D."

"I refer to Gen. Sherman and Rev. B'y'n Sunderland."

Dahlgren's interview with Green and his opinion of him appear in his testimony before the subcommittee as follows (*ibid.*, pp. 644, 645):

"The WITNESS. I was informed that I had testified in the Abra case, and that my testimony had been purchased for a 'good round sum of gold.'

By the CHAIRMAN:

Q. Who was your informant?—A. A. A. Green.

Q. Where does he live?—A. He is living a great deal in the Republic of Mexico.

Q. Was he your acquaintance?—A. He was an acquaintance of mine; yes, sir.

Q. A man whose opinion you respected?—A. I

knew nothing against him. He had been the original owner of the Candalaria mine, of which I had been the superintendent, and therefore I had been brought into business contact with him.

Q. In consequence of that information what did you do?—A. He then told me *what my testimony had been*, and asked me if that was the case. I was very angry, and I then put myself into communication with Mr. Lines and wrote that letter to him."

At that time, Green was in the employment of General Slaughter under his contract with the Mexican Government. Green had probably examined Dahlgren's deposition in Washington; at all events, he pretended to be familiar with its contents, and undertook to tell Dahlgren what his "testimony had been." There is no evidence that Green stated the contents of Dahlgren's deposition to him correctly, or that Adams had ever said he had obtained the deposition from Dahlgren by bribery. There is not the least likelihood that Adams ever made such a statement, or would have made it, even if it had been true, for the award in favor of La Abra Company had been rendered only recently, and Adams was largely interested in it, and aware of the opposition to its payment by the Mexican Government, and he would, therefore, have been the last man to say anything reflecting upon its integrity. But, of course, Green's representations were calculated, as they were doubtless intended, to make Dahlgren angry and eager to prevent his deposition from being of any further service to Adams or the Company.

The measures he would be likely to pursue when in such a frame of mind can be imagined from his conduct as described in the course of his examination before the subcommittee. It will be remembered that Green as well as Dahlgren had a grudge against Adams, and that Green had, besides, a pecuniary interest, under his agreement with Slaughter, in making Dahlgren hostile to the Company and the award.

Great importance is given to Dahlgren's testimony before the subcommittee by the fact, already mentioned, that he was the only witness produced before the subcommittee by the Mexican Government of all the witnesses whose depositions were filed with the Joint Commission; also by the fact that it was on his letter of November 12, 1877 (*supra*), that the Mexican Government based its charge that testimony had been "forged" by Adams in favor of the Company's claim; and this importance is enhanced when it is remembered that Dahlgren's examination may fairly be regarded as showing the best that could be done in the way of impeaching the award if the question of its validity should ever be submitted to the Court of Claims as proposed by Mr. Morgan's bill. In this view it is considered proper to examine Dahlgren's testimony before the subcommittee at considerable length.

A critical examination of Dahlgren's letter shows that when it was written—more than five years after his deposition was taken at the United States consulate at Mazatlan—he had forgotten at what length he had been examined, and supposed that a single sheet would have contained his deposition. "My testimony," he says in his letter, "was taken in *rough notes*, and left for him to copy or fill in, over my signature, on *a clean sheet*." The original deposition on file in the Department of State contains eight sheets, written on both sides, and signed by Dahlgren near the middle of the sixteenth page. He admits his signature to be genuine, and his testimony shows that his answers to Adams's questions (which answers were not written out by Adams but by Peña) were quite voluminous. These questions and answers which Dahlgren in his letter calls "rough notes," were, he says, corrected by him—interlined and crossed out to such an extent as to make them unfit for use as a deposition. A

fair copy was therefore necessary, and Dahlgren's testimony shows that there was abundance of time for making it, for he testifies that he went to the consul's office "early in the morning," and was there on that business until 1, 2, or 3 o'clock in the afternoon. (*Ibid.*, p. 650.)

The idea that a man of his intelligence, holding the position of superintendent of the Durango Mining Company and consul of the United States, should leave his "testimony" to be "filled in," *over his signature*, "on a clean sheet," in support of a claim for such a large sum against the Government to which he was accredited in his consular capacity, seems preposterous, and if anybody but himself had made such a charge against him it would have seemed too improbable for belief. All the presumptions would have been against it. This is how it seems to have struck Mr. Lines, for when he was asked in his cross-examination whether he had advised Dahlgren, as requested in his letter, how Adams could be brought before a court to substantiate his charge of bribery, he replied (*ibid.*, p, 927):

> "I regarded the statement in Dahlgren's letter as *a very extraordinary one*, and I thought perhaps an *improbable* one; that he had allowed his testimony to be taken in rough notes in that manner, and I thought that Mr. Dahlgren was much more concerned in the matter than the Mexican Government was, and for that reason I held no further communication with him at all, I believe, after sending him that telegram."

A careful examination of Dahlgren's testimony furnishes the strongest proofs of the falseness of his letter. Before he was examined in the subcommittee he had inspected his deposition in the State Department, where it is filed with the other records of the Joint Commission, and he had seen that the original draft or "rough notes" could not have been copied or filled in "on a

clean sheet." So when he came before the subcommittee he testified that his deposition "filled up a number of sheets, and when the chairman asked how many, replied: 'Oh, quite a number; there may have been *a dozen or two dozen sheets*, a large number of sheets;'" and he continued (*ibid.*, p. 647):

> "I then said: 'General Adams, allow me to read over those papers.' He said: 'They are your answers *as written down by my secretary*, and it is long; it is not necessary; have you no confidence in me?' I said: 'I wish to see those papers, and unless I do they can not go out of this room; I must see them.'"

Dahlgren seemed to have forgotten that the "papers" were of no use to Adams, because, at that time, they were neither signed nor sworn to. Dahlgren continues:

> "He then handed me the sheets, and I read them over. I then said: 'General Adams, those are not the answers as I gave them to you, sir, and I will not allow that to pass for evidence.' 'Well,' he said, 'scratch it out or erase it, as you see fit.' That was done, and then I said: 'Now, those answers are satisfactory to me, and I will sign them,' and *I did sign them.* He then said: 'That is not fit to hand in as testimony, all scarred up in that manner.' I said: '*You* had no business to *write those answers* in that way.'"

The witness seemed to have forgotten that his answers had not been taken down by Adams, but by Peña. Dahlgren continued:

> "And I said: 'Well, I am on the way to San Dimas, and I haven't time to stay longer.' I then called to Mr. Sisson, who was consul to Mazatlan while I was United States consul at Durango——
>
> By Mr. FOSTER:
>
> Q. At that time?—A. At that time, yes, sir. I said to Sisson: 'I will sign *a blank sheet of paper*, and put it in your possession as consul, as between

two consuls; you are to transcribe these notes, and retain the original, and hand that signature, with the transcribed sheets ahead of it, to General Adams as my testimony.' Sisson said he would do it. I then jumped on my mule and rode away, 170 miles back to San Dimas."

It will be observed that Dahlgren said that he signed the original deposition, or "rough notes," after his corrections had been made, and, in addition, signed a blank sheet, to be attached to the new copy, which was to be made by Consul Sisson. Next day, his direct examination still continuing, the chairman inquired (*ibid.*, p. 677):

"Q. Did you affix your signature at all after that single blank sheet of paper; *did you sign your name twice?*—A. No, sir; I don't think I did, *because it was in such bad shape that I would not.*"

Dahlgren did not seem to be able to state the same circumstance twice in the same way. He was greatly troubled about his oath—a difficulty which he evidently had not anticipated. When asked whether he was sworn (*ibid.*, p. 647), he said: "I do not recollect, sir; I do not recollect whether there was any formality in swearing me or not." Asked again, after a considerable interval (*ibid.*, p. 650), whether he had any clearer recollection than he had already stated, as to whether he was sworn by the consul, he replied: "I don't recollect as to that." But in certain small particulars, not affecting the sense of his deposition, his memory was most wonderful. He seemed inclined to deny that he had said anything contained in his deposition—the mere fact that it was there seemed to arouse his antagonism. For example, his deposition made him say, "The late Rear-Admiral John A. Dahlgren was my father." In his testimony before the subcommittee (*ibid.*, p. 651), he said, "I never said that. To the question, 'Are you or are you not a son of

the late Admiral Dahlgren, of the United States Navy,' my reply was, '*I am.*'"

An examination of the question in the deposition shows that his consular position, as well as his parentage, was inquired into, and while it might have been properly answered by the words, "I am," instead of the answer contained in the deposition, namely, "Yes; the late Rear-Admiral John A. Dahlgren was my father, and I hold the position suggested in the question, and I am so recognized by said authorities," the two answers mean exactly the same; and it is remarkable that after the lapse of seventeen years Dahlgren could have been so positive that he made the one answer rather than the other.

Recurring again to the question whether he was sworn, Dahlgren said (*ibid.*, p. 677):

> "A. I recollect when I wrote my name. I have seen the document and recognize my name. I handed it to Sisson. I said, 'Consul Sisson, I put this in your charge, to have this transcribed and written—the rough notes;' supposing of course, as a colleague of mine, as one consul for another, that he would act for me. I had just received information that imperatively called me away. It was absolutely necessary to go. I could not delay. It was not my business to tell them that (he had testified previously that he did tell them that). *When I took this to him* he said, 'You swear that this is the truth, the whole truth, and nothing but the truth?' I said, 'I do.'
>
> By Mr. KENNEDY:
>
> Q. Alluding to the blank sheet of paper?—A. Alluding to the testimony I had given.
>
> Q. And you signed a blank sheet of paper and handed it to him?—A. That is it.
>
> * * * * * *
>
> The CHAIRMAN. I will have to take this myself.

Q. You *now* state that you were sworn?—A. Yes; that I was sworn *at first.*

Q. *No; you state that you were sworn.* When the consul that administered that oath to you did so, did he have in his hand or did you have in your hand a paper to which that oath applied?—A. No, sir."

In his cross-examination the same subject was revived. (*Ibid.*, pp. 706, 707.)

"By Mr. WILSON:

Q. Were you sworn on that examination?

By the CHAIRMAN:

Was an oath administered to you?—A. No; that was administered to me *at the beginning.*

Q. Well, was there at the end?—A. I have stated in my examination that when I signed that paper and handed it to Sisson he said, 'Is this the truth, the whole truth, and nothing but the truth?' *holding that blank piece of paper in his hand* which I had requested him to transcribe.

* * * * * * *

I was not sworn *until the examination was over,* and I handed to him that blank sheet of paper, then he said, 'Is this the truth, the whole truth, and nothing but the truth?'

Q. And that is your statement now in regard to it?—A. That is. That is my statement. That is the only swearing that was done in the matter."

Before Dahlgren's testimony is further examined, it may be as well to refer to the testimony of ex-Consul Sisson in regard to the manner in which Dahlgren's deposition was taken. Sisson, who was subpœnaed on behalf of the Company, testified before the committee, on that matter, as follows (*ibid.*, pp. 792, 793):

"By Mr. KENNEDY:

Q. Have you examined the original deposition

of Dahlgren that is now on file in the Department of State?—A. Yes, sir.

Q. When did you first see that document?—A. When did I first see it?

Q. Yes, I mean the 18 pages of which it is now composed?—A. It was made out in my consulate.

Q. Now, will you state the circumstances attending the taking of that deposition? I mean the signing of it by Dahlgren, his oath to its truth, so far as you are concerned?—A. Well, Mr. Dahlgren and Mr. Adams, Mr. Peña, and I think Governor Galan, came up to the consulate for the purpose of making out an affidavit.

By the CHAIRMAN:

Q. Now, do you mean an affidavit, Mr. Sisson, or a deposition?—A. I do not mean an affidavit, I mean a deposition.

Q. In this La Abra case?—A. In this La Abra case. And they sat down in the office there and went to writing.

Q. You say they went to writing. Who went to writing?—A. Mr. Peña did the writing; the interpreter. Adams and Dahlgren were discussing the matter.

By Mr. KENNEDY:

Q. What time of day did these gentlemen whom you have named come to the consulate?—A. Oh, along in the morning sometime. I can not tell exactly what hour they did come.

Q. Well, now, proceed.—A. Well, Mr. Peña went to draw up the paper and they talked it over. I was out and in the room while they were at it, and finally *it was finished* and *all written out.* I went in there then and *swore Mr Dahlgren,* and *it was read over to him.*

Q. You mean this identical deposition?—A. I mean *this identical deposition* that is in the State Department to-day, or was yesterday.

By the CHAIRMAN:

Q. You examined it through, did you?—A. I did.

I swore him—the usual form of oath that was attached there to it—and after it was all through he signed it right there. Mr. Peña witnessed it right there. Then I put my oath to it.

By Mr. KENNEDY:

Q. That is, the certificate?—A. I mean my certificate. Then I signed it and put the seal of office to that. Then I turned it over to *Mr. Danglado*, who put the ribbons through it in the form you see. You see how it is done there, put through and through, brought back, sealing-waxed about the top of it, and he held it up while I put the stamp on that sealing-wax. Mr. Dahlgren, as soon as he signed it, went off."

After reading to Sisson, from the record, Dahlgren's testimony, already quoted, that he had signed a blank sheet of paper, etc., the ex-consul's examination was continued as follows (*ibid.*, p. 794):

"Q. Now, Mr. Sisson, what have you to say to that statement of Dahlgren so far as it concerns you?—A. I can say that *he signed no blank sheet at all* there to my knowledge. *What he signed was this deposition of his.* What he and Adams did and talked about—they talked a great deal—I can not tell, but *this was the result of their work*, was the making his deposition there.

Q. Now I read again to you:

By the CHAIRMAN:

Q. There is one part of that you have not answered. He states there that he makes some declarations to you. What do you say about this?

By Mr. KENNEDY:

Q. I will read that again to him:

'I will sign a blank sheet of paper and put it in your possession as consul, as between two consuls; you are to transcribe these notes and retain the original, and hand that signature with the tran-

scribed sheets ahead of it to General Adams as my testimony. Sisson said he would do it.'

Now, you have just said that Dahlgren never signed any blank sheet of paper in your consulate to your knowledge, and the chairman invites your attention to what Dahlgren says he said to you about transcribing the notes and your promise to do that. Is that true?—A. No, sir; I don't recollect any such thing.

By the CHAIRMAN:

Q. No, but do you deny it?—A. *I do deny it;* yes, sir.

Q. You say it is not true?—A. *I do.*

* * * * * *

No affidavit was ever taken there unless it was written out in full as a deposition.

By the CHAIRMAN (*ibid.*, p. 795):

Q. Is that your reason for saying that Dahlgren has made a false statement, that you never do business in that way, or do you state it as your recollection in connection with this particular paper?—A. *I state that as a recollection.*

Q. In connection with this particular paper?—A. *Yes.*

Q. That he did not sign a blank sheet at all, but *signed the deposition after it had been filled out, and only after it had been filled out?*—A. *That is what I say.*

* * * * * *

By the CHAIRMAN:

Q. Wait one moment; I wish to ask him a question. This document that you saw in the State Department was drawn up, you say, in Peña's handwriting?—A. Yes.

Q. Was that read over to Dahlgren in your presence?—A. Yes.

Q. Who read it to him?—A. Peña, I think, and I think I read some of it myself.

* * * * * *

By Mr. KENNEDY (*ibid.*, p. 799):

Q. You say that every word of the deposition that is now in the State Department was read to the witness in your presence before he signed it?—A. That is what I intend to say."

The consular clerk corroborates Sisson.

It will have been noticed that Sisson said that Dahlgren's deposition immediately after he signed it had been turned over to Mr. Danglada who put the ribbons through it and held it up while the consul put the stamp on the sealing-wax. Sisson had previously testified that his consular clerk was Domingo Danglada, a Mexican, who spoke Spanish, English, and French. After Dahlgren had been examined by the subcommittee, counsel for the Company made inquiries in San Francisco for Peña—the man who read Dahlgren's deposition to him and subscribed it as witness—in order to have him subpœnaed, but found that he was dead. It was discovered, however, that Danglada was still living at Mazatlan, and when the Company's counsel requested that he should be subpœnaed (agreeing to bring him to the boundary line between the two countries), the following telegraphic correspondence was admitted in evidence by consent in lieu of his personal appearance (*ibid.*, p. 938):

"Mr. FOSTER. Before you adjourn we will answer the opposition that we reluctantly, and in order to avoid any excuse for further delay in this investigation, will admit that Danglada, if present, would swear to this statement contained in the telegram.

The CHAIRMAN. I will read it. Shellabarger & Wilson, counsel of La Abra Silver Mining Company, sent a dispatch addressed to Domingo Danglada, at Mazatlan, Mexico, dated February 21, 1889, at Washington, D. C., as follows:

'Dahlgren swears he did not sign his deposition

taken September, 1872, before Sisson, about La Abra claim, but signed a blank sheet of paper. Sisson swears that Dahlgren signed said deposition when fully written out, and that it was read to Dahlgren by Peña in your presence, and you tied it up. Which is the truth? Wire at our expense.

SHELLABARGER & WILSON.

'Via Galveston, February 23, 1889, dated Mazatlan, 23.'

'SHELLABARGER, R. J. WILSON, *Wash'n, D. C.:*

Sisson is correct. Dahlgren signed deposition when fully written out.

D. DANGLADA.'

It is admitted by the counsel for Mexico that if D. Danglada were here he would swear that he received the telegram above copied, and made the answer above copied, and would swear that—

'*Sisson is correct. Dahlgren signed deposition when fully written out.*'

Dahlgren's disposition to repudiate everything in his deposition has already been noticed. Although he had sworn that the original draught or "rough notes" comprised a "dozen or two dozen sheets" and that the examination was prolonged and tedious, he scarcely left enough of his deposition in his testimony before the subcommittee to fill a single sheet. He tried to dispute even the most trivial things in his deposition. One illustration of this has already been given; another is furnished below, which also shows his shiftiness, his readiness to swear to two conflicting facts (*ibid.*, p. 704):

"Q. You have testified as one of the evidences that this is not your deposition——A. Yes.

Q. Hold on a minute now—that you did not say your family was going to *New York* as recorded in this deposition; that you said your family was going to San Francisco. Now, I want you to say whether,

in the light of what you have just stated, you can swear that you did not say that your family was going to New York as it is recorded in this deposition?—A. I have told you that I did not attach any importance. I said they were going to San Francisco. I did not say where else they were going.

Q. I beg your pardon—— A. Well, that is what I say now.

Q. Well, I am not talking about what you are saying.—A. It is an immaterial question.

By the CHAIRMAN:

Q. No, it is not immaterial. It is what you said then. Did you say to that man who took down your deposition that your family were going to New York or going to San Francisco?—A. Well, after an interval of eighteen years, about, *I don't know what I did say*, only that I was going to send them to San Francisco *first*.

The CHAIRMAN. Well, that ought to be satisfactory.

By Mr. WILSON:

Q. No; one moment further. You have sworn here before the committee, and pointed out as one of the evidences that this deposition is not correct, that they recorded it here that you said that your family was going to New York.—A. Well, I did say San Francisco to General Adams.

Q. Now you swear to that? A. Yes; *I swear to that now.*"

Being asked how he happened to sign that sheet of paper half-way up, he said (*ibid.*, p. 700):

"*I do not know that.*

Q. Why not at the bottom as well as half-way up the sheet?—A. *That never occurred to me.*"

But a reason occurring to him just then why it might be prudent to sign a blank sheet for such a purpose near the middle, he continued as follows, without a break:

"I signed it right there in the middle of the sheet

or wherever it is. I do not think I have seen that paper since I put my name on it. *I will tell why I did that.* I did so thinking that upon this they could put in the certificate of the consul. I knew that something was to be added to it, and signed it up so as to give them room."

He testified in his original deposition that in 1871 he removed certain parts of machinery, which the company had abandoned at Tayoltita, to San Dimas, and used them in the mill belonging to the Durango Company, of which he was superintendent; and in his deposition he claimed to have done this with the sanction of the court. (*Ibid.*, pp. 402, 403). In his testimony before the subcommittee (*ibid.*, p. 685) he said that the judge declined to give him permission to take these pieces, and that Granger told him (*ibid.*, p. 689) that if the judge would not allow him to take the machinery it would be all right—he (Granger) would allow him, and under that promise he (Dalghren) took the machinery.

Further examined in regard to this appropriation of property that did not belong to him, he testified (*ibid.*, p. 709):

"Q. You had taken a part of this La Abra Company property from that place?—A. Yes, I had.

Q. Will you tell us the property you took away?—A. I took a water-wheel 24 feet in diameter, and, I think, 6 feet breast.

Q. What else did you take away?—A. I took some retorts.

Q. How many?—A. Two.

Q. What else did you take away?—I took all such machinery as I needed. I can not recollect the pieces, but I took everything I needed to complete my mill at San Dimas.

Q. In other words, *you dismantled this mill for the purpose of building up your own?*—A. *I did.*

Q. From whom did you buy that?—A. Santiago Granger."

He was further examined on this transaction (*ibid.*, p. 733):

"Q. From whom did you purchase this La Abra property that you took away from there?—A. *I took it.*

Q. Just went and took it?—A. I took it; yes.

Q. Did not buy it from anybody?—A. *I paid no money for it,* sir.

Q. By what authority did you take it?—A. I applied to Judge Quiros for permission to take it, and he denied me, and Granger said: 'If he does deny you, I will allow you to go over and take it;' and I did go over and take it; and that is what I did.

Q. You just went there and carried away property that did not belong to you?—A. No, sir; I had permission from Granger to do it.

Q. Where was Granger at the time?—A. *In my employ as bookkeeper.*"

At this juncture, for some reason, Dahlgren thought it was important to conceal the fact that Granger had been in the employment of the Durango Company at San Dimas prior to Dahlgren's arrival at that place. It had been developed that Dahlgren had been dealing with a man in his own employ for property which that man did not own, and that under a pretended permission from him, and without paying him or anybody anything for it, and notwithstanding the refusal of the judge to sanction his proceeding, Dahlgren had plundered the works. Granger claimed that he had been left in charge of the property by Exall in March, 1868, but he had left Tayoltita and entered the employ of Ralph Martin, Dahlgren's predecessor at San Dimas, as bookkeeper. But Dahlgren did not want it to appear that when he arrived at San Dimas, in July, 1870, Granger was already bookkeeper for the Durango Company. And in his cross-examination, having forgotten what he had previously

said on this point, he dodged and prevaricated, as follows:

"By Mr. WILSON:

Q. You found him at San Dimas when you went there?—A. Yes.

Q. And do you know in whose employ he was when you went there?—A. I only know from hearsay.

Q. Well, was he in the employ of your Company?—A. *I do not know.*

Q. Was he at work in the office of your Company?—A. *I could not tell that.*

Q. When you went there?—A. When I went there I found him there.

Q. What was he doing?—A. *I do not know.*

Q. Was he keeping the books of the Durango Company?—A. *No, sir; not that I know.*

Q. Well, what was he doing?—A. *I told you I did not know.*

Q. Well, how soon did you take him into your employ? You found him there?—A. Immediately upon my arrival.

Q. Did you change his employment in any way?—A. *No, sir; I did not.* It was *over three months after I was there* that I took him in my employ.

Q. Well, he was there working for the Durango Company, was not he?—A. *I do not know.*

Q. Who was keeping the books of the Company when you went there?—A. *I could not say that; I did not know.*

Q. Well, who kept the books of the Company during the first three months after you went there?—A. *Ralph Martin.* I was there three months with my predecessor before he left.

Q. And Ralph Martin was your predecessor?—A. Yes.

Q. And who kept the books for Ralph Martin?—A. *He kept his own books* and *I kept my own books.* We started in to wind up the business. It took him three months to wind up, and I started in with my own expenditures.

Q. Well, I want to know whether Granger was doing anything for that Company when he went there?—A. *I do not know; I tell you most distinctly.*

Q. Did you see him there?—A. I did see him there.

Q. Was he about the hacienda all the time?—A. No, sir.

Q. Where was he?—A. Sometimes in town; sometimes in Tayoltita. When he was out of the hacienda I did not know where he was.

Q. But after you had been there three months you put him in as bookkeeper.—A. *Yes; I took him in.*

Q. And after he had been in your employ about a year, when Quiros had refused you the right to take that property, you got your authority from your employee, Granger, and you went over and carried it away?—A. Yes.

Q. And that is the way you got possession of it?—A. Yes."

Now, it will scarcely be credited after reading the foregoing that the following is to be found in Dahlgren's direct examinaton (*ibid.*, 679):

"When did you first become acquainted with James Granger?—A. When I first reached San Dimas in July, 1870.

Q. What was Granger's occupation at that time?—A. *He had been bookkeeper for my predecessor, Ralph Martin, and I retained him in that position during the five years and two months that I was there.*"

A more complete contradiction of all his prevarications on that point could scarcely be put into a shorter sentence.

In his motion before the Umpire for a new hearing, Señor Avila, the Mexican agent in attendance upon the Joint Commission, alluded to Dahlgren's conduct, as disclosed in his deposition, in stripping the mill at Tay-

oltita, as follows (Ex. Doc. No. 103, H. R., 48th Cong., 1st sess., p. 94):

> "Deponent says that in the enterprise of which he is superintendent, the only American one that has escaped the fury of the Mexican authorities, he availed himself of the opportunity by purchasing a part of the property at mere nominal prices from private individuals, in the acquisition of which he was sustained by the judge of the first instance of San Dimas, according to a contract.
>
> Here, then, we have the son of an admiral and (himself) consul taking advantage of robberies, but sustaining the claim to which robbers serve as a cover. If a person who acts in this manner is a reputable witness, the undersigned must then candidly confess that he does not understand the meaning of the word."

What Señor Avila would have said of Dahlgren's conduct if, instead of claiming, as he did in his deposition, that he was authorized by the court to take the machinery, he had testified, as he did before the subcommittee, that he took it notwithstanding the refusal of the court to grant him permission, can readily be imagined.

Before the subcommittee, Dahlgren denied that he had said in his deposition, in answer to the question how his Company could remain at San Dimas without disturbance, that they had had disturbances, and difficulties, and had been obliged to submit to all exactions, whether lawful or unlawful, but had found out how to manage and *interest them*, otherwise they would have been compelled to leave like the others without a doubt. That Dahlgren did make such a statement in his deposition and that it was true is made probable by the testimony of his predecessor as superintendent of the Company's mines at San Dimas, Ralph Martin, an unimpeached witness, whose deposition on behalf of the Company was taken in New York before United States

Commissioner Stilwell in June, 1874. On this point Mr. Martin said (Appendix, p. 470):

> "There was in reality, no protection given to foreigners in the country, and I never knew any effort to be made by the authorities there to extend protection to *Americans who were at variance with Mexicans*, excepting only in cases *where the profits of the mining enterprise were shared by said authorities.*"

Many more instances of Dahlgren's untrustworthiness could be cited from his testimony before the subcommittee, but another must suffice. It was claimed by counsel for the Mexican government that certain statements contained in Dahlgren's deposition could not have been made by him, because the facts stated were not within his knowledge; for example, that when he was examined at Mazatlan, on the 18th of September, 1872, he did not know the names of the Company's mines, and therefore could not have mentioned them. When Mr. Foster was examining Dahlgren upon the questions and answers in his deposition seriatim, his attention was drawn to the fourth question and answer, reading as follows (*ibid.*, p. 651):

> "Question 4th. Where are said mines and property situated, and of what did said improvements of claimant consist, and in what condition are they now?
>
> Ans. The principal mines of 'La Abra Silver Mining Company' are in 'La Abra' Mountain, near Tayoltita, in said district of San Dimas. Their names are 'El Rosario,' 'El Cristo,' 'La Abra,' 'La Talpa,' 'El Arrayan,' 'El Sauce,' and some others in that district whose names I have forgotten."

Then his examination was thus continued:

> "Q. Is that a correct answer to the question as you gave it?—A. No, sir; *because* I didn't know *what mines* they possessed.

Q. Did you ever know, *by name*, the mines whose names are here given? Did you ever know whether or not they belonged to La Abra Company?—A. No, sir; I knew that La Abra mine belonged to the Company. I had been at El Arrayan, but I didn't know the names of the rest of the mines belonging to the Company.

Q. And you did not attempt to give the names in that examination?—A. No, sir; nor their condition."

But subsequently, in his reply to a question whether he had testified, in his deposition, "to anything as to the denouncement of the Rosario mine by Granger" (*ibid.*, p. 653), he replied: "*I believe I did.*" That made three of the Company's mines whose names he knew prior to his examination at Mazatlan—"La Abra," "Arrayan," and "Rosario." Further on, his attention was again directed to the names and value of the Company's mines, as stated in his deposition, "more particularly to 'La Abra,' 'El Rosario,' 'La Talpa,' and 'El Cristo' veins, and to a remark of his in his said deposition that he 'should like to own them, and, if it were possible, to raise capital to work them.'" Whereupon, forgetting that he had said a short time before that he did not know their names, he replied that *he could have owned them if he had wanted to*, and that he had the means to work them, and then, to show how familiar he was with the Company's mines, and in what a practical manner, he added (*ibid.*, p. 659):

"Some people *repeatedly* asked me to go over there and *take hold of those mines*, but I always declined.

Q. Why did you decline?—A. Because I sent over my right-hand man to look over the district, and if there was anything good to secure it.

* * * * * *

My rule always is to send out my right-hand man to look at a property first, and then if he reports

favorably on it, I go myself and look at it, and if it is good I take it."

But without this evidence that he had received a report on the Company's mines, there would be a strong probability supporting his deposition that he knew their names, and, in a general way, their location and characteristics; for during more than two years prior to his examination at Mazatlan he had been associated intimately with James Granger, who knew all about the mines, and General Adams had been his guest at San Dimas, and had there made examinations of witnesses preliminary to taking their depositions in court. And Dahlgren testified that he "heard the case talked of *pro* and *con* in his hacienda" (*ibid.*, p. 670):

"We would sit there of an evening and talk of it."

He had been at San Dimas over two years, and his "right-hand man" had made a report on the Company's mines before he made his deposition at Mazatlan in September, 1872.

Besides, in referring to his book on the "Historic Mines of Mexico," in which the Company's mines, "La Abra," "Rosario," "La Luz," and "El Cristo," are mentioned, he said to the subcommittee (*ibid.*, p., 687):

"I have always kept carefully a mining diary, and *as I got information about mines* I placed it down, tabulated it, and kept it. *During the five years I was in Mexico I did that*, and finally I got such a mass of data I put it into shape."

It is also to be remarked that in speaking of his frequent visits to the company's hacienda in October, November, and December of 1871, when he was helping himself to the machinery, he said (*ibid.*, p. 685) that nobody at that time was occupying the Company's mines. In the earlier part of his examination before

the subcommittee (*ibid.*, top of p. 652) he said that he did not know "anything whatever of the mines that La Abra Company abandoned"—alluding to the time when he made his deposition at Mazatlan—but it afterwards appeared, as already observed, from a memorandum in his note-book that two months before he was examined at Mazatlan he had made a personal examination of "El Arrayan." It also appeared that he knew his book-keeper had denounced "El Rosario," and that he (Dahlgren) was intimate with Francisco Torres (*ibid.*, p. 686), who worked that mine and "La Luz" in partnership with Granger in 1870 or 1871.

The testimony of ex-Consul Sisson or Domingo Danglada was not necessary to prove that Dahlgren committed perjury in maintaining, as he did before the subcommittee, the truth of his letter to Lines in regard to the manner in which his deposition was taken at Mazatlan. It does not appear that his deposition could ever have been of much importance in the case, so far as the award was concerned, for he did not arrive at San Dimas until July, 1870, more than two years after La Abra Company had abandoned its property, and the great bulk of his deposition was hearsay. It is true that he vouched again and again in the strongest terms for the honesty, intelligence, courage, and truthfulness of his Mexican "mozo," Avalos, whose three depositions—two taken on behalf of the Company, and one alleged to have been taken by a Mexican judge in court on behalf of the Mexican Government—are printed in the appendix, and have been already noticed in this report. But Dahlgren's deposition takes its chief importance from the fact that he denied having made it in the form in which it was submitted to the Joint Commission, and that his denial, coupled with his aspersion upon General Adams, was made so prominent in the so-called "new

evidence offered by Mexico" so early in the efforts of that Government, through General Slaughter and his subagents, to impeach the award.

The testimony of ex-Consul Sisson and of Domingo Danglada, with Dahlgren's own contradictions and inconsistencies, have destroyed his credibility and relieved General Adams and the Company from any discredit or stigma cast upon them by Dahlgren's letter. That Dahlgren's letter was injurious to General Adams, and, reflexively, to the Company, is beyond dispute; for in an earlier report by Mr. Edmunds for Mr. Morgan, from the Committee on Foreign Relations (July 7, 1886), it is said that the evidence submitted by the Mexican Government in the document entitled "Claims against Mexico" shows "that some of the testimony offered by the Company to establish its claim before the Commission was *forged* by its agent and attorney, Adams.* The reference in that report is to Dahlgren's letter; which was printed therein with the following caption in italics: "*Letter from C. B. Dahlgren to Mr. Robert B. Lines, stating that his deposition in favor of La Abra Silver Mining Company has been forged.*" This charge will now have to be withdrawn with the other charges falsely accusing General Adams of having been short in his accounts as captain and assistant commissary at the close of the Mexican war, and of having been thrice court-martialed, (and, inferentially, disgraced) during his service in the United States Army in the war for the Union.

One of the most remarkable and satisfactory features of the recent investigation was the formal withdrawal of the charges against General Adams, affecting his military record, by one of the counsel for the Mexican Gov-

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* Report 1454 and Views of the Minority, Sen., 49th Congress, 1st Sess., 4.

ernment (Mr. Lines) in the course of his cross-examination. The official documents showing the falsity of the charges reflecting on the personal integrity of General Adams were received in evidence and are printed, with the testimony of Mr. Lines on the subject, on pages 931–934 of the appendix.

It seems to the undersigned that the testimony taken before the sub-committee, instead of impeaching the award, has shown the strong foundations upon which it rests and has justified the wisdom and equity of the Umpire.

APPENDIX IV.

Mr. Lines' negotiations with Mr. Elder.

[From Report No. 2705, Part 2—Views of Minority—50th Cong., 2d Sess, pp. 49–54.]

The references are to the appendix of the majority report in which the testimony is printed. Mr. Elder was examined by the Senate subcommittee January 29, 30, 31, and February 1, 1889, and Mr. Lines February 21, 1889.

Mr. Lines at this time was also negotiating with another former employé of the Company, Mr. A. B. Elder, for documents which he claimed were in his possession, and Mr. Elder had sent a letter which he had received from Mr. Lines to General Bartholow, who, it will be remembered, was one of the Company's stockholders, and its first superintendent at the mines. In this letter, which is dated at Washington, January 17, 1878, Mr. Lines alluded to the negotiations which he was conducting, through the detective Fisher, with Exall in New York, as follows (*ibid.*, p. 635):

> "Exall is in New York. I have not his address, but my agents are in communication with him, and he shows, as I am informed, a disposition to purge himself of the false swearing into which he was undoubtedly led by older rascals."

The expression—"to purge himself"—used by Mr. Lines at the time, shows that he and his principals—General Slaughter and the Mexican Minister—were trying to induce Exall to "unswear" what he had sworn to in his depositions on behalf of the Company before the Joint Commission, and swear to a different state of facts. In his own testimony and in his examination of Mr.

Elder, Mr. Lines was careful to discriminate between documentary evidence, which he admitted he would have advised the Mexican Government to purchase, if of the kind desired, and one's own affidavit, which he held could not properly be purchased. He also said that when he wrote to Elder that Exall was showing a disposition "to purge himself," he did not use the expression in its technical sense. But Mr. Lines' unstudied statement in his contemporaneous letter to Elder, taken in connection with Mr. Kittelle's positive testimony on this point (*ibid.*, pp. 768, 772, 773), and the probabilities indicated by the situation, would show conclusively that it was new testimony from Exall himself, under oath, as well as any books or papers of the desired character he might possess, that the Mexican Government, by its agents, was trying to obtain. On this point Mr. Lines testified as follows (*ibid.*, p. 928):

> "Q. Now, you go on to say, referring to Exall: 'And he shows, as I am informed, a disposition to *purge himself* of the false swearing into which he was undoubtedly led by older rascals.' Who was it that gave you that information?—A. Mr. Fisher. He informed me that Exall claimed to have papers, documents, and to be willing to furnish them.
>
> Q. No; but you say that 'he shows a disposition *to purge himself* of the false swearing.' What did you mean by that?—A. Well, I did not use that in the technical sense. I was not corresponding with a lawyer, and I meant merely that Exall showed a disposition, as I was informed, to furnish testimony which would show the truth of the matter.
>
> Q. Well, do I understand you that if a man *who had sworn falsely was willing to sell documents in his possession for a good round price* that you would call that *purging himself?*—A. I would not call it so in a conversation between you and me, but in a letter of this kind I might do so. That was all I meant, at least, by the expression."

But Mr. Elder, who was produced before the subcommittee as a witness on behalf of the Mexican Government, had written to General Bartholow, inclosing an alleged "verbatim" copy of a portion of another letter received by him from Mr. Lines, which reads as follows (*ibid.*, p. 636):

[Copy of a letter from R. B. Lines to A. B. Elder, copied by A. B. Elder.]

"WASHINGTON, D. C., *February* 17, 1878.

Verbatim.]

Your evidence, backed by these memoranda in view of your position, ought certainly to be conclusive. Sundell said in Sept. the ores were all there. The lobby in behalf of the Co. finding itself unable to suppress investigation is now trying delay it with more success. Just when it will commence is still uncertain. Let me know what you will furnish the memoranda *sworn to* by you and Exall letter for.

Exall is in N. Y. and I think in a few days we shall have his papers. My agents are in communication with him in N. Y., and he is weakening very rapidly. I shall be glad to forward to him anything you may offer. I do not know his address, as everything is done through my agents.

There is much in the letter not in this.

[In pencil:] R. B. LINES.

Yours, A. B. ELDER.

I have an offer to go to China. Silver mines there. Do you want any stock in the Co.? The prospects are good. May be so; dividends."

It is only fair to Mr. Lines to say that in his testimony before the subcommittee he said (*ibid.*, p. 930):

"These words '*sworn to by you*,' I am very positive, were not in any letter I ever wrote to Mr. Elder."

In one of his own letters to General Bartholow, Elder states plainly what the Mexican authorities wanted from him and what they had offered him for it. He

had fixed the price at $10,000, and the following was evidently intended to draw out a bid of something over $8,500 for his wares (*ibid.*, p. 639):

"LONE PINE, CAL., *April* 5, 1878.

General BARTHOLOW:

DEAR SIR: Yours of the 24th ult. come duly to to hand and contents noted. I sent to you a few days since a postoral card asking the return of Mr. Lines' letter. If you have not already started it you need not be in a hurry about doing so. In a letter from Washington a few days since they, through an agent, have offered $1,500 *less than I asked* them; *they want my deposition* and the letter and memoranda, and I think I will accept, as I have been losing in the sheep business for the last year.

As for the Co. for China, it is not perfected yet. I will let you know more of it soon.

Hoping, yours truly,

A. B. ELDER."

Elder's letters to Mr. Lines had been printed in the "New evidence offered by Mexico" with certain insinuations and charges against the Company, the falsity of which was shown by Mr. Elder's cross-examination before the subcommittee, as follows (*ibid.*, p. 593):

"Q. Now, I wish to direct the attention of the witness to the statement of the Mexican Government on page 428 of Ex. Doc. 103, under the title of 'New evidence offered by Mexico.' I will read you a sentence or two:

'Herewith are transmitted the originals of certain letters addressed by A. B. Elder, the assayer for La Abra Company, to the Mexican minister and Mr. Robert B. Lines. Mr. Elder desired to find a market for the knowledge which he possessed of the affairs of La Abra Company. He was informed that if he had any documents, clearly authentic, bearing upon the case, *there might be room for a negotiation*, but that affidavits were not regarded

as purchasable. Mr. Elder claimed to have such papers, and was asked to produce them and name his price. This, as his letters show, he failed to do, and the correspondence with him was dropped. He appears, however,— And this is the point to which I invite your careful attention— He appears, however, to have *found a market* for the letters addressed to him in reply by Mr. Lines? Now, I want to ask you whether it is a fact that you ever found any market anywhere for the letters addressed to you by Mr. Lines?—A. *Never in the world, sir.*

Q. Is there the slightest foundation in fact for the assertion of the Mexican Government which I have just read to you? Did you ever offer any of Mr. Lines' letters for sale to anybody?—A. *Never.*

Q. Did you ever receive anything for any of Mr. Lines' letters from anybody?—A. *Not one cent.*

Q. Did anybody ever offer to pay you one cent for any of Mr. Lines' letters?—A. *Never.*"

Elder not only contradicted thus explicitly the intimation in Mexico's "New evidence" that he had found a market for the letters addressed to him by Mr. Lines, but he also testified to the falseness of the charge which the Mexican Government had made against the Company, as follows (*ibid.*, p. 595):

"Q. Now I invite your attention to another sentence in your letter of April 8, 1878, to Mr. Lines: 'Through some party, to me unknown, I am offered a good show to go to China to look after a silver mining company's affairs.' I ask you who it was that made you that offer?—A. Well, I don't know who it was that made me that offer.

Q. I ask you whether you have any reason to suppose that it was made to you by any officer, or other party interested in La Abra Company?—A. *I have no reason to believe so.* Such propositions were often made to me.

Q. It was nothing uncommon?—A. Nothing uncommon.

Q. You had been mining how long?—A. Ever since 1853.

Q. Now, I want to invite your attention to the statement made by the Mexican Government in regard to that China business, on page 430 of that same document, No. 103, under the title of 'New evidence offered by Mexico.' I now read to you, Mr. Elder:

'*Either Mr. Elder has exhausted La Abra treasury*, or else the persons conducting the affairs of that Company have *swindled* him, as *they did their other witnesses*, by failing to carry out *their contract and send him to China.*'

Now, I ask you whether there is the slightest foundation in fact for the allegation that you had any contract with any officer of La Abra Company, or with the Company itself, to go to China, or for the allegation that they swindled you by not sending you there?—A. *None whatever.*

Q. Can you think of any reason for such a statement being made?—A. *I can not imagine any. I certainly never received any such proposition from any member of La Abra Company.*"

It will have been observed that the "offer to go to China" was communicated by Elder in his letter of February 17, 1878, to General Bartholow (*supra*), and not by General Bartholow to Elder. It is certainly quite a remarkable feature of this recent investigation by the subcommittee that one of the most serious charges made against the Company by the Mexican Government in its formal presentation of its case to Congress and the Department of State, should be proved false by one of its own witnesses, and that witness of all men necessarily best informed as to the fact.

It seems clear that if Elder's memorandum book had really contained what he said it did, he would have sworn to its correctness and sold it to the Mexican Gov-

ernment, but he never produced it, or any other papers, although he received the following considerate assurance from Mr. Lines (*ibid.*, p. 635):

> "You may rest assured that there is no disposition to take advantage of your voluntary offers or to use your information, which is of unquestionable value, to your prejudice."

Elder failed in his efforts to use Mr. Lines' letters as an inducement to General Bartholow or La Abra Company to enter into competition with the Mexican Government for what he had to sell, and he had shown himself so evidently purchasable, or Mr. Lines was so sure that he had nothing worth buying, that in preparing the statement of the "new evidence offered by Mexico," Mr. Lines dismissed him, but, nevertheless, printed his letters and availed himself of the occasion to make a charge of the most infamous conduct on the part of La Abra Company, which, according to the Mexican Government's own showing before the subcommittee, was without any foundation or color of excuse.

After a lapse of ten years, the Mexican Government seems to have thought that something could still be made out of Elder, and he seems to have thought that something could still be made out of the Mexican Government. He was subpœnaed on behalf of the Mexican Government by the subcommittee on the 14th of January, 1889, in a telegram from the Sergeant-at-Arms, informing him that he would be allowed mileage at the rate of 5 cents per mile each way and $3 per day while detained in Washington. (*Ibid.*, p. 622.) He responded immediately:

> "I must see money, and *more than you offer*, before I leave home."

The Sergeant-at-Arms replied:

> "You will be allowed [no] more than the law allows, and the United States Senate commands you to come."

To which Elder responded:

> "I am *not of the kind* that works for $3 per day, nor will I leave here without money to pay all expenses liberally, and I will come near *having something to say about it.*"

This was January 16. The same day he telegraphed again:

> "Send $500. Will leave on 20."

Elder seems to have been in some confusion of mind, for he testified, on cross-examination, in explanation of his telegrams, that he did not know which side had subpœnaed him, and that before reporting to the Sergeant-at-Arms he went to see the Company's counsel in Washington. He thought that perhaps it was the Company that wanted him.

As a sample of the manner in which Mexico would impeach Sir Edward Thornton's award in this case, if the Senate bill under consideration should pass, and the Court of Claims should take jurisdiction, some extracts from Elder's cross-examination are appended (*ibid.*, p. 625):*

> "Q. Did you report to the Sergeant-at-Arms when you arrived in Washington?—A. I did not.
>
> Q. How long were you in Washington before you reported to the Sergeant-at-Arms?—A. I got in Friday, after 9 o'clock.

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*Elder was one of the witnesses by whom the Attorney General promised, in the XVIth paragraph of the bill, to prove "that the material allegations of the said memorial and the material testimony submitted by said defendant Company in support of said claim are false." (*Record*, 16.) But Elder was not produced in this suit, nor the failure to produce him explained.

Q. When did you report to the Sergeant-at-Arms? —A. Monday morning. I was sick *Saturday and Sunday; did not get out of the hotel.*

Q. What day was it that you were at Judge Shellabarger's office?—A. *That was Saturday morning.*

Q. Now, will you swear that you did not say to me, in the presence of another person sitting in the same room, that you had put a value of $10,000, during the time that you were corresponding with Mr. Lines, upon the memoranda and the letter mentioned in that correspondence?—A. I believe I said so to you, and I consider that if the memoranda was worth anything it was worth that to a party——

Q. Why did you come to Judge Shellabarger's office before you reported to the Sergeant-at-Arms? —A. I supposed from that telegram that La Abra Company caused my being summoned here.

Q. Did you not have at that time *a letter in your pocket dated December 28, 1888, from the consul-general of Mexico at San Francisco, informing you that your presence was required here as a witness?*—A. *I did.*

Q. Did not you show that letter to Mr. Kennedy in the conversation that took place at Judge Shellabarger's office?—A. In your office?

Q. Well, it was my office; put it that way.—A. Judge Shellabarger referred me to you. I supposed from the nature of the telegram that it was——

Q. The question is, did not you show to Mr. Kennedy in his office the letter now in evidence addressed by the consul-general of Mexico at San Francisco to you, dated December 28, 1888, informing you, substantially, that your presence would be required here as a witness in this La Abra investigation?—A. I presume I did."

Following is the letter from the Mexican consul-general at San Francisco, which, it will be observed, is dated about three weeks earlier than the subcommittee's subpœna (*ibid.*, p. 573):

[Correspondentia Particular Del Consul-General De Mexico. Alejandro K. Coney, 604 Clay Street, San Francisco, Cal.

DECEMBER 28, 1888.

"DEAR SIR: It being necessary, in the interest of justice, that your testimony be heard by the committee of Congress in the matter of the 'Abra' claim, your expenses to Washington and back will be paid, as also during your stay at the capital. Will you kindly answer at your earliest convenience, and oblige,

Yours, very truly, A. K. CONEY.

Mr. A. B. ELDER,
Santa Clara."

Some light is thrown upon Elder's motives and expectations in the subjoined passage from his cross-examination (*ibid.*, pp. 624, 625):

"The CHAIRMAN. Well, proceed, Mr. Kennedy, if you please, to lay your predicate.

By Mr. KENNEDY:

Q. I want to ask you, if you please, Mr. Elder, whether on or about the 19th day of January——

Mr. FOSTER. The present month.

By Mr. KENNEDY:

Q. Whether on or about the 19th day of January, 1889, while you were crossing the bay in California on a ferry-boat you met a man by the name of Alexander S. Gillespie, or any man at all, to whom you said that you had been subpœnaed to Washington City to testify in reference to some old claim between American capitalists and the Mexican Government; that you were an assayer of minerals, etc.; that the claim was about some mines in Mexico; and whether you further stated that the Mexican Government had promised you $50,000 if you would give evidence favorable to them. Also, whether you said that unless the other party gave you more money you would likely give the kind of evidence required?—A. I met a man on the ferry and we

were talking. He said he was a blacksmith; said he had been here, and I told him. He asked me which way I was traveling, and he had been to San José hunting a job as a blacksmith. I told him I was coming to Washington, and I said I had been summoned there by telegraph of the Sergeant-at-Arms of the United States Senate in an award claim of some citizens of the United States against the Mexican Government. He remarked, 'Is there much money depending?' I said, 'Yes, I think there is nearly $1,000,000.' 'Well,' he says, 'they ought to pay you well to go on such a trip as that.' Now, as to my saying that the Mexican Government had offered me $50,000, that I never said. There was talk that they *ought* to pay me for a trip of that kind. I said, '*I presume they will pay me.* I don't know, but the Sergeant-at-Arms says I will get 5 cents a mile. It will be almost like riding on the boom to get there and back.' I says, 'If anybody gives me anything *it will be voluntarily.*' I says, 'I can not demand anything for my evidence.' What I know is simply what I knew at the mill, and the thought of getting any stipulated amount has never entered my head.

Q. Did you say anything about the other party?—A. La Abra?

Q. The Company?—A. Not a word that I recollect of; not one word."

The letter referred to in the foregoing extract had been received by Mr. Sherman, chairman of the Committee on Foreign Relations, and handed to Mr. Morgan, chairman of the subcommittee. The letter is herewith appended, with the agreement of counsel in regard to it (*ibid.*, pp. 687, 688):

"The CHAIRMAN. It is agreed by counsel that if Alex. S. Gillespie were present and under oath, he would make the statement in regard to the conversation with A. B. Elder, which is contained in the following letter, and the presence of Gillespie is by agreement dispensed with.

The letter is as follows:

'OAKLAND, CAL., *January* 19, 1889.

To the honorable Chairman Committee on
Foreign Relations, Washington, D. C.:

To-day while crossing the bay here on ferry-boat I met a man who said he had been subpœnaed to Washington City to testify in reference to some old claim between American capitalists and the Mexican Government; that he was an assayer of minerals, etc., and the claim was about some mines in Mexico; and stated further that the Mexican Government had promised him $50,000 if he would give evidence favorable to them; he also said that unless the other party gave him more money that he would likely give the kind of evidence required. He lives at San José, Cal., and will be in Washington about January 26. He is paying his own expenses to Washington for the present, and expects to have a private interview with Señor Romero, the Mexican minister, as soon as he arrives in Washington. Perhaps this may be of service to your committee, as he said both sides subpœnaed him.

Hon. G. R. Tingle (chief seal island agent, Alaska), at present in Washington, D. C., knows me and you can refer to him about trustworthiness.

Respectfully,

ALEX. S. GILLESPIE,
752 Brush street, Oakland, Cal.'"

APPENDIX V.

Mexico's Charges Against General Adams.

[From Mr. Lines' examination by the Senate subcommittee, February 21, 1889, Rep. No. 2705 Sen., 50th Cong., 2d Sess., pp. 931-933.]

"Q. Now, I think you have stated that you are the author of that double-column presentation of Mexico's case?—A. I think so, almost alone. I don't remember that I had any collaborator in it other than clerical assistance.

"Q. I would like to ask you whether, if you are the author of the remarks derogatory to the military record of General Alonzo W. Adams in connection with courts-martial which are referred to in that statement, you had read the records of these courts-martial at the time that you made those aspersions upon General Adams?—A. I had not read the records.

"Q. Have you read the records since?—A. I think you have called my attention to them, and I can not say I have read them thoroughly, but I can say this, that *I am very sorry to have said anything or been the means of publishing anything about a man that has turned out not to be true.*

"Q. Well, do you know now that in both of those cases General Adams was not only acquitted but his accuser censured?—A. Well, as I say, I have not read the records, but I am perfectly willing to take that on your statement, Mr. Kennedy; and having said what I did a moment ago, I should like to say this further in explanation.

"Q. Well, I think what you have said is greatly to your credit, and I am perfectly satisfied with what you have said on that point.—A. Well, I should like to put in an explanation, if the chairman will permit me, of the manner in which some of these things came into that record. I had, when that document was made up, been the subject of an attack in the House of Representatives, based upon these affidavits, which have been shown, of Mr. Kittelle and Mr. Ely, and these letters which it appears were in the possession of General Bartholow and so on, and I felt considerably exercised about it and very sore. I had demanded of the member of the House who made this attack to see the papers on which he based it, and he had, as I considered, evaded my demand. He gave me a letter to General Bartholow asking Bartholow to give me the papers, particularly my letter, and on Bartholow's stating that he (Mr. Wilson) had the letters, Mr. Wilson declined to search any further for them, and left me in that position of being attacked under the privileges of the House of Representatives.

"Q. You mean Mr. Benjamin Wilson?—A. I mean Mr. Benjamin Wilson, yes. *That was the occasion of my using some of this matter, and it got in the record in the way in which it was used.*

"Q. Now, were you the author of the statement that General Adams' accounts were in arrears when he was discharged as quartermaster or from whatever office he held at the close of the Mexican war?—A. That statement came to me in a letter, which, I think, is in the record, from the Secretary of War, I believe.

"Q. Now, I want to ask you whether you have ever seen this certificate of non-indebtedness from the Treasury Department, dated at the Third Auditor's Office, June 18, 1884, and printed on page 46 of this pamphlet, entitled, 'Arguments made before the House Committee

on Foreign Affairs?' Perhaps you had better read it, so that the stenographer can take it down. It is very short.—A. (Reading):

'*Certificate of non-indebtedness.*

No. 6993.] TREASURY DEPARTMENT,
Third Auditor's Office, June 18, 1884.

It is hereby certified that the accounts and returns of Alonzo W. Adams, captain and A. C. S., United States Volunteers, * * * have been examined, found correct, and are closed.

This certificate is granted to satisfy the pay department that the above-named officer is not indebted to the United States on the books of this office at the date hereof.

E. W. KEIGHTLEY,
Third Auditor.

Metropolitan Hotel, room 164, city.'

"Q. Now, there is another certificate following that, showing *when* the account was closed.—A. Do you wish me to read the whole of it or give the date merely?

"Q. No; I think it is only fair toward this dead man that we should do something by way of reparation on the record.—A. (Reading):

'WAR DEPARTMENT,
OFFICE COMMISSARY-GENERAL OF SUBSISTENCE,
Washington, D. C., March 27, 1879.

SIR: Referring to my indorsements of December 17, 1877, and August 24, 1878, with reference to the accountability of A. W. Adams, who was captain and assistant commissary of subsistence of volunteers during the Mexican war, I have the honor to inform you that that officer's accounts have been closed on the books of this office, *it having been ascertained since the date of my above-mentioned indorsements that the amount* ($109.40) *previously reported as due the United States from him was satisfactorily accounted for by a transfer requisition* (*No. 7883*) *in the sum of $139.60, dated February 23, 1849, and*

passed to his credit in a settlement made at the Treasury Department February 24, 1849.

Very respectfully, your obedient servant,

R. MACFEELY,
Commissary-General Subsistence.

The honorable SECRETARY OF WAR.'

"Q. Do you notice that *General Adams' accounts were closed in 1849, shortly after the close of the Mexican war?*—*A. Yes; I notice that.*

"Q. Now, I want to ask you, Mr. Lines, whether you ever saw these documents before?—A. I think I have seen those before, but when, I do not remember.

"Q. Now, Mr. Lines, are you aware of the fact that after these documents were exhibited to the Senate committee and to individual Senators, a report was printed, in the name of the Senate committee, that reiterated those charges growing out of the courts-martial and alleged shortage in the accounts?—A. No, sir; I am not aware of that.

"Q. Well, did you take any steps—

"The CHAIRMAN. 'Was there such a report as that?

"Mr. KENNEDY.' Yes, sir.

"The CHAIRMAN. 'Who made it?

"A. Well, it was made. I think it was made either by Mr. Edmunds for you, sir, or by you yourself, and there was an exhibit in small type attached to the report reiterating those charges; that, I may say, now that General Adams is dead, nearly broke his heart. I was his personal counsel.

"The CHAIRMAN. 'You mean the charges broke his heart, or the report?

"Mr. KENNEDY. 'No, I mean the charges. The report did not say a thing against General Adams. There was nothing in the report that bore on General Adams at all, but the report was accompanied with an

appendix in small type from some previous report that reiterated those charges. That is all, Mr. Lines.

* * * * * * *

"The CHAIRMAN. I do not remember any report that I ever made, or in my consideration of this question, that General Adams' official conduct had any bearing or was commented upon or referred to in any way.

"Mr. KENNEDY. No; I think there was nothing about General Adams in the report itself, but I do remember distinctly—and I will show it to you by and by, if you desire me—I do remember distinctly, that in an appendix to the report these then-disproved charges against General Adams, touching his military history, were reiterated.

"The CHAIRMAN. Do you mean that the appendix of the report contained a copy of some previous report made in the House of Representatives?

"Mr. KENNEDY. No, I do not think it was a report in the House of Representatives. But I do want to say that I never have believed, and had no intention of suggesting here, that you or any other Senator would knowingly print anything about General Adams or anybody else, reflecting on his character, without what would be considered satisfactory proof; and my only purpose was to get out of Mr. Lines whether he or his associates took any pains after these documents were filed with the House committee—I mean the official reports from the War Department and the Third Auditor's office and the certified copies of the courts-martial—*whether Mr. Lines or any of his associates took any pains to redress the wrong which had been done to this man, touching his military history, which, of course, every soldier regards as precious.*"

The following statement will explain the foregoing

incident, and will illustrate the evils of appealing from the Executive to Congress, under the agencies employed by Mexico, in a question of diplomatic cognizance and international concern:

In a note to Mr. Frelinghuysen, dated May 1, 1882, *while the negotiations for a new convention were pending*, Mr. Romero, the Mexican Minister, inclosed what he described as "a synopsis of the evidence recently obtained by the government of Mexico of the fraudulent character of the claims of Weil and La Abra." In this synopsis, which was evidently prepared by Mexico's counsel, and which was *an argument and appeal for a retrial of the claims by a new commission*, the following statement was made to Mr. Frelinghuysen, on the authority of the Mexican government, in regard to General Adams, who had obtained the evidence in support of the Company's claim in Mexico:

> "After the Mixed Commission had been organized, it occurred to these unfortunate mining speculators to retrieve their lost fortunes by *forging* a claim against the Mexican government. In the execution of their conspiracy they sought for a proper agent to supplement their own perjured testimony by such evidence as might be necessary to impose upon the Commission, and their choice fell upon one Alonzo W. Adams, who was constituted the agent and attorney of the moribund Abra Mining Company to collect *ex parte* affidavits. In the new evidence submitted by Mexico will be found the history of his checkered career. (Case of Mexico, p. 59 *et seq.*)"

Among the charges made in this "synopsis" against General Adams were the following:

> "*Dismissed from the Army* at the close of the Mexican war, station unknown; *charged with fraud* in the

quartermaster's and *a defaulter in the commissary department, * * * three times court-martialed for* misconduct during the late war."

This "synopsis," with Mr. Romero's note enclosing it to Mr. Frelinghuysen, was transmitted to the Senate by President Arthur with the convention for a rehearing of the claim, and is printed in Executive M., Confidential, 47th Congress, 1st session. This document was reprinted in the appendix to Senator Morgan's report from the Foreign Relations Committee (Rep. No. 1316, Sen., 49th Cong., 1st sess., pp. 26–40), June 11, 1886, after these charges had been disproved by the production of the official documents. The disproof of these libellous falsehoods was doubtless potent in causing the rejection of the convention by the Senate. But that they should be republished by printing a "Confidential" message of the President as an appendix to a public Congressional document, without a word of explanation, was an outrage that ought to be impossible in a civilized country.

General Adams served in the Mexican war, and was brevetted Brigadier General by President Lincoln for services in the war for the Union. But he incurred the enmity of the Mexican Government and its agents in this country by going twice to Mexico and there collecting evidence in support of the claims of La Abra Company and other citizens of the United States. These false charges were made against him to raise a presumption in support of the other false charge that he had been guilty—as the Mexican Minister assured Mr. Frelinghuysen (*supra*)—"of forging a claim against the Mexican Government." This charge of forgery was disproved and abandoned long before this suit was brought, although, as said by Mr. Chief Justice Nott, in his dissent-

ing opinion, it was the one thing necessary to be proved to justify the subversion of the award.*

Since General Slaughter's agreement in 1877 with the Mexican Government, "to undertake the proof of fraud in the claim of La Abra Mining Company" for a share of the fund in controversy, payable only in the event of success, followed, as it was, by a similar agreement between the Mexican Government and Granger, reputations have been attacked and facts misrepresented so wantonly and persistently as to furnish a most signal illustration of the danger of assailing an award by such methods, and of the wisdom and authority of the old maxim, that it is to the interest of the commonwealth that litigation shall cease.

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*Speaking of the government's failure to prove such fraud as would justify the annulment of the award, Mr. Chief Justice Nott said:

> "There is but one way by which they can have the international question re-examined, and that way is by alleging and proving that the orders and letters of the Mexican officials, upon which the Umpire relied, and which made the international case presented to him, *never existed*, and that the award was obtained by fraud, effectuated, not by perjury, but by *forgery*." (*Record*, 850).

Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
Clerk

No. 189. 29.

Brief of Wilson for Appt.

Filed Nov. 29, 1898.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 189.

LA ABRA SILVER MINING COMPANY, APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

ASSIGNMENT OF ERRORS.

1. The Court of Claims erred in assuming jurisdiction over this matter, because it is not a case nor a controversy to which the United States is a party.

2. The Court of Claims erred in not dismissing the bill, because it seeks to review and reverse the action of the President of the United States in a matter of international concern exclusively within his discretion and control.

3. The Court of Claims erred in not dismissing the bill, because it requires a collateral inquiry to be made into the merits of an international award rendered by a tribunal of exclusive and final jurisdiction.

4. The Court of Claims erred in not dismissing the bill, because the alleged new evidence could have been obtained and used while the claim was pending before the international commission.

5. The Court of Claims erred in not dismissing the bill, because its allegations relate solely to issues passed upon by the international commission, and because the new evidence is merely cumulative and does not show the kind of fraud for which equity grants relief.

6. The Court of Claims erred in not dismissing the bill, because the proceeding seeks to deprive the company of its property without just compensation or without due process of law.

7. The Court of Claims erred in not dismissing the bill, because the alleged fraud was neither properly charged nor proved by the Government.

8. The Court of Claims erred (because of the unconstitutionality of the act) in entertaining jurisdiction of this suit.

SYNOPSIS OF FACTS BEARING UPON THE QUESTIONS OF JURISDICTION.

In the brief of counsel for La Abra Company will be found set forth in detail the facts necessary to the consideration of the questions of jurisdiction with reference to pages of the record.

Briefly stated, they are:

1. David J. Garth and Thomas J. Bartholow, in the spring of 1865, purchased certain mines in Mexico.

2. La Abra Company was incorporated under the laws of New York in November, 1865.

3. Garth *et al.* conveyed the mines to La Abra Company (its title not being in dispute).

4. In the purchase of the mines, erection of reduction works and machinery, extraction of ores, etc., the company expended $341,796.06. It began reducing ores in 1867.

5. The company alleged that by reason of unfriendly and hostile action on the part of Mexican officials it was forced

to abandon its property in February or March, 1868. (For details as to this, see Mr. Kennedy's Brief, page 3.)

6. On July 4, 1868, a convention was concluded between the United States and Mexico, and proclaimed February 1, 1869, by which such claims were submitted to a joint commission composed of two persons, one appointed by the United States and one by Mexico, with provision for an umpire in case of disagreement, the awards made by the commissioners or umpire to be final.

7. The company's claim was submitted to the commission June 14, 1870, by a memorial and docketed "La Abra Company *vs.* Mexico, No. 489."

8. The commissioners disagreed, and an award was made in favor of the company against Mexico by the umpire on the 27th of December, 1875.

9. Mexico filed a motion for a rehearing *September 19, 1876*, which was denied by the umpire *October 20, 1876*.

10. Pending the hearing, it was charged by Mexico that evidence produced by the company was false and procured by fraud, and testimony was taken in that regard by both parties while the case was pending, and was considered by the commission and the umpire.

11. Mexico, after the award had been made, attempted to reserve the right to show at a future time that the claim was fraudulent and the award was obtained by perjury.

12. The Mexican minister addressed a communication to Mr. Fish (Secretary), setting up this pretension on the part of Mexico, which Mr. Fish, *December 4, 1876*, declined to entertain.

13. March 29, 1877, Mexico made an agreement with Gen. James E. Slaughter, of Alabama, to pay him 10 per centum of any portion of La Abra award which he might procure to be waived or withdrawn. General Slaughter was to procure testimony for the purpose of impeaching the award, Mexico to pay $3,000 on account of expenses.

14. In November, 1877, Mexico arranged with one Granger,

who had testified twice in *support* of the claim and four times on behalf of Mexico *against* it, to produce witnesses adverse to the claim and "bind them to testify upon such terms as will be arranged by common agreement beforehand," Granger to receive $3,500 "only in case that the government shall be definitely and completely exonerated from the payment" of La Abra award.

15. Mexico had made payments on these awards which the United States had not disbursed. The contention of Mexico having been brought to the attention of Congress, it was by the act of June 18, 1878 (20 Stats., 145) provided that the President "is hereby requested to investigate any "charges of fraud presented by the Mexican government as "to the cases hereinafter named, and if he shall be of the "opinion that the *honor* of the United States, the *principles* "*of public law, or considerations of justice and equity* require "that the awards in the cases of Benjamin Weil and La "Abra Silver Mining Company, or either of them, should be "opened and retried, it shall be lawful for him to withhold "payment," etc.

16. The President, by Secretary Evarts, made this investigation. Mr. Evarts made his report August 8, 1879. It was approved by the President and communicated to the parties August 13, 1879.

He decided that neither the *principles of public law nor considerations of justice or equity require or permit* that these awards should be reopened and the cases retried before a new international tribunal, etc.; that there was "grave doubt" as to "the *sincerity of the evidence as to the measure of damages*" in the case of La Abra Company, and that "the "*honor* of the United States *does require* that these two cases "should be further investigated by the United States to as-"certain whether this Government has been made the means "of enforcing against a friendly power claims * * * "*based upon* or *exaggerated* by fraud."

"It may be that as the *main imputation* in the case of the

"*La Abra Company* is of a *fraudulent exaggeration of the claim* "*in its measure of damages*, it may consist, with a proper "reservation of further investigation in *this* case, to make the "distribution of the installments in hand.

"I have this subordinate consideration still under exam- "ination, and should you entertain *this distinction*, will sub- "mit my further conclusions on this point."

17. This was a decision by the Executive that the La Abra *claim* was not a fraudulent one.

18. On this subordinate question (extent of damages) Mr. Evarts reported to the President September 3, 1879, saying:

"Upon a renewed examination * * * I am con- "firmed in the opinion that the proper limits of further "consideration which the *honor* of the Government should "prompt it to give to this award, should confine the inves- "tigation to the question of a *fraudulent exaggeration of the* "*claim*," etc.

19. Mexico applied for a reconsideration of this question September 9, 1879, but on the 17th of September, 1879, Mr. Evarts' second report having been ~~offered~~ approved by the President, the payment of the three installments in hand was made to the company.

20. These reports and a supplemental one of Mr. Evarts, of April 13, 1880, were communicated by the President to Congress on April 15, 1880, and bills were there introduced directing the Court of Claims to investigate the Weil and La Abra claims, which failed because the Judiciary Committee of the Senate reported adversely to withdrawing these claims "from the dominion of international jurisdiction."

21. A treaty was negotiated in 1882 having for its object a retrial, but it was rejected by the Senate in 1886.

22. Attempts to amend and enlarge the act of 1878 were then again made in Congress, and failed until the close of 1889—three years of effort—when the bill, now the jurisditional act, was introduced.

Without further details, the act in question was passed in 1892 making up a case for the Court of Claims.

So, in brief, the conditions are these:

(*a.*) La Abra Company owned property in Mexico.

(*b.*) The company asserted that it had been deprived of that property by the wrongful act of Mexico.

(*c.*) It presented that claim to a tribunal having jurisdiction, created by treaty between the two nations.

(*d.*) That tribunal made an award that was final.

(*e.*) Mexico asserted before the award was made (and produced evidence on the subject) that it was procured by fraud and perjury, and again asserted it after it was made.

(*f.*) The political department decided that the claim was a valid one, that the award was final, but that the *honor* of the United States required that this complaint of Mexico should be investigated for a definite purpose—the ascertainment of damages—etc., and Congress directed a suit to be brought against La Abra and assigns in the Court of Claims, with the power to render a final decree foreclosing all claims of the company on account of this award.

POINTS.

I.

The company has a vested property right in this award of which it cannot be deprived without due process of law.

II.

The United States had no interest of a pecuniary nature in the award or the money paid on account of it.

III.

The United States had no such relations to the case as that they could go into any court and maintain any proceeding against any party claiming an interest.

IV.

Congress undertook to create a case by the act in question. This was beyond its power.

V.

The judicial power is limited by section 2, article III, of the Constitution to "cases in law and equity arising under "the Constitution * * * laws * * * and treaties, "and to controversies to which the United States shall be "a party."

VI.

This limit fixed by the Constitution cannot be extended by Congress.

United States vs. Hudson, 7 Cr., 33.

Story on the Constitution, sections 1590–1594.

See also section 1703 of Story, where it is said, treating of this section:

"Affirmative words often by their operation imply a *nega-* "*tive of other objects* than those affirmed. And in this case, "a negative or exclusive sense must be given to the words, "or they have no operation at all."

VII.

This is not a "case" arising under the Constitution, a treaty, or a law.

It being clear that Congress cannot confer jurisdiction over matters not enumerated in the Constitution, it becomes necessary to consider whether what we have here is or is not a "case" in the sense which the term is used in the

section under consideration, and whether it "arises" under the Constitution, a treaty, or a law, for it must not only be a *case*, but must *arise* under the Constitution, a treaty, or a law, to bring it within the judicial power.

(*a.*) It is not a "case" within the meaning of the Constitution.

There can be no "case" unless a party has some *right* to be asserted.

The judicial "power is capable of acting only when the "subject is submitted to it by a party who asserts his *rights* "in the form prescribed by law." (*Osborn vs. The Bank*, 9 Wheaton, 819.)

The United States is not asserting any right, and has no right to establish which it could appeal to the judicial power.

(*b.*) The rights as to which the judicial power may be invoked "*must be rights of person or property;* not merely "*political rights, which do not belong to the jurisdiction of a* "*court, either in law or equity.*" (*Georgia vs. Stanton*, 6 Wall., 50–76.)

VIII.

It must not only be a *case*, but must also be a case *arising* under the Constitution, a law, or a treaty.

This controversy does not "arise" under either.

"A case may be said to *arise* whenever its correct decision 'is dependent upon the *construction* of the Constitution, 'laws, or treaties of the United States." (*Osborn vs. The Bank*, 9 Wheat., 819.)

"A case in law or equity consists of the right of one party "as well as the other, and may be truly said to *arise* under "the Constitution, or a law, or a treaty of the United States

" whenever its correct decision depends upon the *construction* " of either."

Story on the Constitution, sec. 1648.
Cohens vs. Virginia, 6 Wheat., 378.

This proceeding does not depend upon the construction of the Constitution, a law, or treaty.

IX.

It is not a *controversy* "to which the United States *shall* be a party."

CONTROVERSIES.

What are the "controversies to which the United States shall be a party," within the meaning of that word as used in the Constitution? "Controversies" embrace only *civil suits.*

Note 1 to section 1674 of Story on the Constitution is as follows:

"Mr. Tucker distinguishes between the word 'cases' used in the preceding clauses and the word 'controversies' here used (referring to said clause of the Constitution). The former he deems to include all suits, criminal as well as civil; the latter as including only such as are of a civil nature. As here applied, controversies 'seem,' says he, 'particularly appropriate to such disputes as might arise between the United States and any one or more States respecting territorial or fiscal matters, or between the United States and their debtors, contractors or agents. This construction is confirmed by the application of the word to the ensuing clauses, where it evidently refers to disputes of a civil nature only, such, for example, as may arise between two or more States, or between citizens of different States, or between a State and the citizens of another State,' etc. 1 Tuck. Black. Comm. App., 420, 421. Mr. Justice Iredell, in his opinion in *Chisholm vs. Georgia*, 2 Dall., 419, 431, 432,

gives the same construction of the word 'controversies,' confining it to such as are of a civil nature."

See also—

Cohens vs. Virginia, 6 Wheat., 411, 412.
Curtis' Com., sections 66, 67, 73.

A "suit" is a prosecution or pursuit of some *claim, demand*, or *request* (*Cohens vs. Virginia*, 6 Wheat., 264); it is a prosecution of some demand in a court of justice. Suit applies to any *proceeding* in a court of justice in which the plaintiff pursues his remedy to recover a *right* or *claim* (18 Wall., 553). It is any action or process for the recovery of a *right* or *claim*, legal application to a court for justice, the prosecution of a *right* before any tribunal, as a civil suit, a criminal suit, a suit in chancery (Webster's Dictionary).

It is respectfully submitted, therefore, that the word "controversy," which is synonymous with "civil suit," relates to a matter wherein the party who brings it is setting up some *right, demand, or claim* in which he has an interest to be enforced by some judicial tribunal. A party plaintiff is a party who asserts a *right in himself* or one who asserts a right in some one who is legally incapacitated to sue and whom he is by reason of his relations legally empowered to represent.

This is not such a "controversy."

In this case the United States is *not asserting any right in itself*, but is practically and in effect, so far as any pecuniary interest is concerned, representing the government of Mexico. The only relation the Government of the United States has to this case is political in its character. In the inception of the case, the United States in its political capacity negotiated the treaty as a means of enabling its citizens to have a judicial ascertainment of their rights against Mexico. After the award was made, Mexico, notwithstanding the finality provision of the treaty, through her minister, Mr.

Mariscal, communicated to the Department of State (Secretary Fish) an objection to the award on the ground that it was procured by fraud and perjury.

On December 4, 1876, Mr. Fish declined to entertain or consider any question as to the finality and binding nature of the awards. Mexico, however, continued to make its objections and appeals to the political department of the Government, as has already been stated, and finally it was decided by the political department that neither the principles of public law nor considerations of justice or equity required or permitted, as between the United States and Mexico, that the award in this case should be opened and the case retried before a new international tribunal or under any new convention or negotiation.

Nevertheless, a subsequent treaty was negotiated, as we have already seen, for the purpose of reopening this award; which subsequent treaty was submitted to the Senate for its concurrence and rejected. This rejection followed the introduction of a bill in Congress having for its object the submission of this controversy to the Court of Claims, which was reported adversely by the Committee on the Judiciary, then composed of Messrs. McDonald, Thurman, Bayard, Garland, Lamar, Davis, Edmunds, Conkling, and Carpenter. Their report, after stating that the facts involved were of an international character, which, in the opinion of the committee, properly fell to the executive department of the Government, proceeded to say:

"The bill under consideration proposes to withdraw those two claims (one being La Abra) from the dominion of international jurisdiction and place them before a tribunal organized and existing solely by virtue of the laws of this country, and in this way it would seem designed to avoid the opening up of other questions of complaint that are known to exist on behalf of citizens of the United States which for various causes failed to receive favorable consideration by said commission under the treaty creating the commission. * * * It would seem right that if it is to

be set aside as to any of the claims, it ought to be by a new convention in which provision should be made for doing justice to all the claimants."

From this it is obvious that it was then the opinion of the Committee on the Judiciary of the Senate, composed of the eminent lawyers named, that this controversy was international in its character and could only be dealt with by the political department of the Government by means of the negotiation of a new treaty reopening the matter of the adjudication of all the claims alike submitted to the Mixed Commission under the treaty. It certainly was within the power of the President, in his discretion, to negotiate a treaty with Mexico in relation to this matter. It was clearly within his jurisdiction, and, to use the language of this court in the case of *Frelinghuysen vs. Key* (110 U. S., 75), "that "discretion of the executive department of the Government "cannot be controlled by the judiciary."

If that discretion cannot be controlled by the judiciary, it hardly need be said that it is not within the power of Congress to authorize the judiciary by any judgment or decree to control that discretion; but that is exactly what this act making up this case for the Court of Claims does. By its very terms the court "may enter a decree which shall bar "and foreclose all claim in law or equity on the part of said "La Abra Silver Mining Company * * * to the money "or any such part thereof received from the Republic of "Mexico for or on account of such award," and the President is authorized "to return to said government any money "paid by the government of Mexico on account of said "award remaining in the custody of the United States * * * "which said court shall decide that said persons are not en- "titled in justice and equity to receive out of said fund," with a further provision for distribution of the money in case it is decided that the claimant is entitled thereto.

It is respectfully submitted that this is an encroachment

upon the powers of the President. It is an interference with the political department of the Government in respect of the powers and duties devolved upon that department and the discretion of the President in respect thereof. It will be observed, as we have already said, that this is not a submission of this case to the Court of Claims for the purpose of securing a finding of the facts to be submitted to the President for his advice or his aid, but is an act which obviously contemplates—indeed, expressly provides—for a final adjudication of the claim, which is intended unmistakably to control the President's action in respect of the disposition to be made of the money on hand.

X.

The act is void because it trespasses upon the domain of the political branch of the Government.

In its inception and throughout this is a matter that belongs to the political department of the Government.

(*a.*) The matter of protecting the citizen against the wrongs of a foreign power is *political;* at every stage it is political and because it involves dealings with a foreign government. It cannot be transferred from that department to the judicial or to any other department so as to divest that department to which in its nature it belongs of authority over it or control of it.

The Constitution has located it, and there is no power short of an amendment of that charter that can change it, and so, no matter what judgment or decree may be rendered by any court, the Executive might wholly ignore it as a meddlesome, unauthorized interference with his powers.

He would not be bound by any obligations of his office to regard what any court would adjudge or decree, but, notwithstanding such judgment or decree, would be free to do what he deemed to be his duty. Whatever might be his

respect for the tribunal, he must be responsible for his own judgment, for on him is imposed the responsibility.

The decree in this case cannot bind him; it cannot be enforced. It may be absolutely disregarded, and there is no remedy, and all of this because of an attempted invasion of the Executive by the legislative or judicial power.

The umpire in this case distinctly decided that Mexico had failed in her duty to protect this company, and that compensation must be made for this. He ascertained what that compensation should be by finding the amount of money actually expended by the company.

Can it be possible that the question of the *amount* of such liability can be taken out of that department and turned over to the judiciary for its determination? Suppose the President disagrees with the court, can he be compelled to adopt and execute its judgment? Suppose that notwithstanding the decree, he looks into the record and reaches the conclusion at which Mr. Chief Justice Nott arrived, viz., that Mexico's liability is the amount of the award, less $117,000, may he not act accordingly?

This decision that Mexico was liable was afterwards, at the instance of Mexico, considered by the President, and he determined that there was a valid claim. The only thing left undetermined was the question of fraudulent exaggeration of damages.

In such a case can this determination of such liability be segregated from the political department and transferred to the judicial, either with or without the consent of the former? Can it be possible that when the President has decided that Mexico was liable under the facts as known to him a court can adjudge to the contrary?

He would be acting within his own jurisdiction. No court could enforce its judgment to the contrary, and, if his refusal to obey the judgment of the court were made the ground of impeachment, such a proceeding would obviously

fail, because the court was interfering with a matter as to which he had jurisdiction and the court had not.

XI.

Due process of law.

Even if Congress had power to confer jurisdiction on the Court of Claims, the interpretation of the act in question by that court makes it *not* "due process of law," as it was a proceeding not according to the course of the *common* law.

By "due process of law" is meant "a course of legal proceeding *according* to those *rules and principles* which have "been established by our jurisprudence for the protection "and enforcement of private rights."

Pennoyer vs. Neff, 95 U. S., 714.
Kennard vs. Louisiana, 92 U. S., 480.
Hagar vs. Rec. Dist., 111 U. S., 701.

Among the rules and principles that have been established are that a party claiming to be aggrieved must show the exercise of due diligence, etc.

And it must be open to inquiry whether he did or did not have the very evidence upon which he now relies and suppressed it or did not avail himself of it; whether, in short, he was not himself guilty of laches or worse than laches, because of which negligence or dirty hands a court of equity would unceremoniously turn him out of doors.

Due process of law involves considerations such as these, but the Court of Claims in dealing with this act seems to have felt compelled to take a different view.

Mr. Justice Weldon, in declaring the opinion of a majority, says:

"The question of diligence on the part of Mexico is not, "we conceive, before this court; that question was passed

'upon by Congress in the passage of the law giving us 'jurisdiction, etc." There is a quiet, grim humor in this.

The Court of Claims was not oblivious to the fundamental principles of equity involved in a case of this character and had not lost sight of one of the most conspicuous, to wit, that a party making complaint must show proper diligence, etc., yet felt constrained to say that they had been released from considerations of that character, as Congress had kindly dispensed with that particular element of what constitutes "due process of law."

If the act bears that interpretation, it is grossly violative of constitutional rights of the citizen. It is hostile to the principles of constitutional government; it makes the citizen a defendant in its own suit and robs him of his defense.

If it will not admit of that interpretation, then a great and grievous error has been committed, for, as will hereafter appear, Mexico did not have clean, but very *dirty*, hands. She had, or by the exercise of the most ordinary diligence could have had, this very evidence which is now said to be newly discovered. In short, she has not only been guilty of the grossest laches, but of concealment and bad faith to such a degree that when exposed in a court of equity that was untrammeled would have been incontinently "turned down."

Yet the court felt constrained to omit the consideration of those principles that enter into "due process of law," because Congress had generously relieved it from such considerations.

Whether the act does or does not do this, whether the court was right or wrong in so construing it, can make no difference. The company was deprived of a most important element of what constitutes "due process of law," either by the act or by the construction placed upon it.

XII.

If this act is void as an attempt to confer judicial power, it cannot be upheld for the purpose of conferring mere "advisory" authority.

1. It cannot be diverted from the obvious purpose for which it was intended by Congress to a wholly different purpose. The intention was to confer *judicial* power. This is evidenced by—

(*a.*) The provision for a suit.

(*b.*) The authority to issue injunctions, make interlocutory orders, final decrees, etc.

(*c.*) The provision for an appeal from any final decision to this court.

(*d.*) A legislative injunction prohibiting the Secretary from paying out any of the money pending the suit—a palpable interference with the executive department.

2. The act is a systematic whole and all must stand or all must fall. It can only be used for what was intended. It cannot be availed of for what was not intended.

> *United States vs. Ferreira*, 13 Howard, 373, and note appended thereto in relation to the cases of Yale Todd and Hayburn.

"As the act of Congress intended to confer on the courts "a judicial function, it could not be construed as an author- "ity to the judges comprising the court to exercise the "power out of court in the character of commissioners."

No provision can be taken out of this act without defeating the obvious intention of Congress. There is no hint that it was intended to be advisory. On its face it shows that it was intended to control, and not to advise the President.

XIII.

Has this court jurisdiction to entertain an appeal?

The answer to this depends upon several questions:

1. If it is a matter that is justiciable by an inferior court that has jurisdiction; yes, because this court is empowered to correct the errors of inferior courts.

2. If the inferior court had no jurisdiction, this court has the power to so determine; and if it determines it had none, then, of course, this court has none to entertain the appeal.

3. If the act is only to get advice from the Court of Claims for the guidance of the Executive, this court must dismiss the appeal, because this action of the Court of Claims is only advisory, and not judicial.

XIV.

If the Court of Claims has jurisdiction, this court must review the whole evidence.

This was the view taken below by both parties to this litigation, and also by the Court of Claims. The complainant did not make any request for finding of fact, nor did the defendant.

Mr. Justice Weldon, in delivering the opinion of the court (R., p. 838, 839), held that this was not a case in which that court was required to find the facts, but that it was a case in equity in which the whole record—all the testimony—must go to this the Supreme Court for its consideration, and he cites *Harvey vs. The United States*, 105 U. S., 671, in support of this conclusion.

All parties and the court concurred in the view that this was a proceeding in equity where findings of fact would be inappropriate.

That Congress intended that this case, involving matters of international concern, should be subjected in all its elements to the scrutiny of this court cannot be doubted. If this court should now hold that findings of fact are essential under the circumstances just mentioned, the ends of justice and the purposes of the act would demand that the case be remanded for such findings.

But it is by no means conceded that findings of fact are necessary or permissible in this case. On the contrary, if the Court of Claims had found the facts, this court would send for the entire record, as was done in the case of *The United States vs. The Old Settlers*, 148 U. S., 465.

This is a case in equity.

(*a.*) The act provides for a suit to set aside and forever foreclose any claim to this award.

(*b.*) It provides for the exercise of equity powers.

(*c.*) It provides for ascertaining what, if any, part of this award was procured by fraud.

(*d.*) It provides for an appeal.

If, as is contended, a finding of facts is required, then the appeal to this court would be useless.

The ultimate fact in the case is fraud or no fraud.

Whether there was fraud or not is the one fact in the case.

That one fact is to be deduced from the evidence.

Everything that the Court of Claims could do in respect of findings, aside from the one fact upon which the case hinges, would be to find what the various witnesses testified to, etc., from which the fact of fraud or no fraud was determined.

This would be putting the evidence in the record in the form of findings, so that in the one form or the other this

court must review the evidence, or the appeal provided for is an empty and idle formality.

It is respectfully submitted that if this court should proceed only upon findings of fact and not by reviewing the evidence, the intention of Congress will be defeated.

JEREMIAH M. WILSON,
Of Counsel for Appellant.

Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY,

No. 189. 29.

Mem. of Argt. of Wilson for Appt.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

Filed Feb. 20, 1899.

No. 189.

LA ABRA SILVER MINING CO., APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

Memorandum of Opening Argument of Mr. J. M. Wilson for the Appellant.

STATEMENT OF FACTS.

1. La Abra Company owned mines and other property in Mexico.

2. The company abandoned this property, and alleged that it was compelled to do so by reason of the unfriendly and illegal acts of Mexican officials and of the Mexican populace, by reason of which, and the refusal of the authorities to grant protection when applied for, loss was sustained.

3. This claim was submitted to the joint commission created by the convention of July 4, 1868, between the United States and Mexico, and an award was made by the umpire, Sir Edward Thornton, December 27, 1875, in favor

of the company, he holding that the Mexican officials had not afforded the protection to which the company was entitled.

4. Mexico claimed that the award had been procured by fraud and perjury, and the act conferring jurisdiction on the Court of Claims, in section 1, directs the Attorney General to bring suit to determine whether that award, as to the whole sum or *any part thereof*, was obtained "by fraud, "effectuated by means of false swearing, or other false and "fraudulent practices on the part of the said La Abra Silver "Mining Company or its agents, attorneys, or assigns."

Section 2 gives the court jurisdiction to render such decree "*as the evidence may warrant, according to the principles "of equity and justice.*"

Section 4 provides that if the award is adjudged to have been "obtained by fraud, effectuated by means of false "swearing," &c., the company and its representatives or assigns shall be barred of all claim, &c.

Section 5 provides that if it shall be finally adjudged "that the *award* or any *definable* or *severable* part thereof "was *not* obtained through fraud as aforesaid," then "so "much of the said award" shall be distributed to the persons entitled thereto.

Briefly summarized, this act provides that the court shall adjudge according to the principles of equity and justice whether the award as to the whole sum or any part of it was procured by fraud effectuated by false swearing, &c. If in whole, the whole to be barred; if not so procured, the whole to be paid; if only in part it was so procured, that part to be barred, and the residue, not tainted with such fraud, to be paid.

BRIEF.

POINT I.

THE QUESTION WHETHER LA ABRA COMPANY HAD A VALID CLAIM AGAINST MEXICO IS NOT OPEN TO INQUIRY IN THIS PROCEEDING.

1st. The antecedent history, of which this court is fully informed and will take notice, and a part of which is in the record, precludes such inquiry.

The liability of Mexico under the principles of international law was first determined by the umpire, he holding that Mexico had failed in her duty towards this company.

And, secondly, it was again determined by the executive, after a thorough examination of the evidence before the umpire and evidence produced after the award was made. The executive department held that any further inquiry should be limited to the question of fraudulent exaggeration of damages (R., p. 13).

After this, distributions were made of installments up to 1881. (See extended statement on this in brief for appellant, pp. 22–24.)

This was a determination that there was a valid claim against Mexico. (See dissenting opinion of Nott, C. J., R., p. 843; Brief, pp. 47–70.)

POINT II.

THE AWARD IS AT LEAST PRIMA FACIE PROOF IN THIS CASE THAT LA ABRA COMPANY HAD A VALID CLAIM AGAINST MEXICO FOR THE "SUM" NAMED IN IT; AND THE BURDEN OF PROOF IS ON THE UNITED STATES TO SHOW THAT, IN WHOLE OR IN PART, IT WAS PROCURED BY FRAUD, EFFECTUATED BY FALSE SWEARING, &C.

The treaty under which it was made created a judicial

tribunal to which the claim was submitted and provided that the *award* should be *final*.

This is not a trial *de novo*.

The act recognizes the award and provides for a suit to get rid of it, or reduce it, or confirm it.

The suit concerns that award, and the court is required "in all respects to proceed according to law," and render such decree as the "evidence may warrant," "according to the principles of equity and justice."

Therefore the award, being the judgment of an international tribunal, which judgment is to be destroyed, if at all, by a legal proceeding according to law and the principles of equity, must be regarded as valid in every respect until by evidence according to the rules of equity it is set aside.

The case of The Choctaw Nation *vs.* The U. S. is instructive if not conclusive on this point (119 U. S., 1).

In that case there was a submission by treaty between the nation and the United States of certain differences to the Senate, and the award of the Senate was by this treaty agreement to be final, and an award was made by the Senate.

Nevertheless Congress referred these same differences to the Court of Claims, with jurisdiction to try "*de novo*," and with the express provision that the court "shall not be estopped by any award of the Senate;" and this court held that the award should have "the *prima facie* effect of establish-"ing the validity of the claim," and that the burden of proof was upon the United States to show its want of merit.

But the case at bar is much stronger than the Choctaw case in favor of our contention that the award must have at least *prima facie* force, because in this there is no requirement that the proceeding shall be *de novo*.

Point III.

TO SET ASIDE THIS AWARD THERE MUST BE CLEAR PROOF THAT IT WAS PROCURED BY FRAUD, EFFECTUATED BY FALSE SWEARING.

If there was before the umpire evidence sufficient to justify or sustain his conclusion that Mexico had so failed in her duty under the rules of international law that La Abra Company had a valid claim, which evidence has not been shown to be perjured, then his conclusion in that respect must be sustained.

The finding of the umpire on this feature of the case is on page 8 of the record.

The fundamental question of fact upon which Mexico was held liable, and for the want of which there could not be an award in favor of the company, was and is this question of hostile acts of Mexican people and officials, and failure to protect.

That is the basis of the action of the umpire.

He found from the evidence before him that the hostility did exist; that the protection was not afforded, although the company appealed to the higher authorities, and that by reason of this the company had a valid claim, and he so awarded.

Now, was that conclusion procured by false swearing, &c.?

That is the question here, or it may be otherwise stated thus: Was there evidence before the umpire that was not fraudulent or perjured, upon which he could find and was justified in finding that such hostility existed and such protection was not afforded? If there was such evidence, then it is impossible to find that the award, so far as regards Mexico's liability, was procured by fraud, &c.

This involves an examination of the evidence before the umpire and the evidence adduced since as to the integrity of such as was before him, upon which he found that Mexico was liable.

The evidence before him was conflicting.

He had to determine as to its reliability and the weight to be given to such as was reliable, and in order to overthrow or set aside his award it must be made to appear that

he was led to make it by false swearing or fraudulent practices of La Abra Company, its attorney or agents.

It is not a question whether there was conflict of evidence, or whether any witness testified falsely, or how the testimony of such witness was procured, but it is the question whether his conclusion that there was a valid claim was based on false or fraudulent testimony.

The burden being on the United States to show that it was so procured, and the underlying question being whether or not these hostilities did exist, and whether or not there was a failure of duty on the part of Mexican officials, it becomes necessary to examine the evidence that was before the umpire, and that since produced, and thereby to ascertain whether there was evidence, unimpeached, by which the award is sustained.

EVIDENCE BEFORE THE UMPIRE.

Matias Avalos, p. 52.

Matias Avalos has not by any one, before or since, been discredited as a witness.

On the contrary, his truthfulness and honesty are established, as follows:

(*a.*) Ralph Martin indorses him as an honest, truthful man (p. 470).

Dahlgren says he is a truthful, honest man (p. 98).

In a subsequent deposition, Avalos reaffirmed what he had before testified in this matter (R., p. 93), and in that connection (p. 94) states the details of the effort that was made to force from him a retraction of his evidence formerly given.

He is a truthful, conscientious, honest man, and this infamous effort was unavailing.

What he says is worthy of the most serious consideration in this case, as it must shed a flood of light upon methods and evidence produced by Mexico to overthrow this award (R., p. 94).

Marcus Mora.

His deposition was before the umpire.

He was one of the Mexican officials, as will presently appear.

He testified to this hostility (R., pp. 86, 87).

Jesus Chavarria.

His deposition was before the umpire, and is in the record, pp. 80, 81, 82, 83, and 84.

He is vouched for as a lawyer of high character by Marcus Mora, as follows:

"He is perfectly well acquainted with Lawyer Chavarria; "that he enjoys a high reputation in his profession and is "considered as a truthful and respectable man" (R., 87).

And *Barraza*, the judge, says of him that he is a resident of Durango, one of the first of its lawyers, and on account of his dignity and well-known integrity *his deposition is beyond all doubt entitled to full faith and credit* (R., p. 85).

In addition to this, there is documentary evidence, upon which no suspicion rests, that of itself justifies the conclusion of the umpire. (See orders, pp. 54, 829, 830.)

This is corroborated by the testimony, taken by the United States in 1894, of De Lagnel (R., pp. 500, 501, 515).

If there is anything in this record, that has been produced since this award was made, that shows that this testimony is false, that these witnesses perjured themselves, counsel for the Government will point it out.

This evidence shows unmistakably just what Sir Edward Thornton found, viz., that the people and the minor officials were engaged in acts of hostility, and that the higher officials, although appealed to for protection, failed to afford it.

It shows a determined purpose on the part of the people, encouraged by the officials, to drive the company out, and it shows that the high authorities refused protection.

OTHER ACTS OF VIOLENCE.

Apart from the general attitude of hostility of the authorities, the following specific interferences with the conduct of its business were detailed by numerous witnesses:

(*a.*) That its supply trains were seized by military officers and large sums exacted and paid for their release (Record, pp. 31, 35, 47, 56, 58, 62, 72, 74, 171).

(*b.*) That two of the company's trainmasters were murdered (*ib.*, 47, 49, 52, 56, 60, 63, 72, 74, 171, 172).

(*c.*) That its ores at the mouth of the mine and on the patio were stolen (*ib.*, 32, 49, 57, 61, 83, 88, 98, 152, 185, 186).

(*d.*) That orders and threats of ejectment were unlawfully made by the prefect at San Dimas and the local magistrate at Tayoltita (*ib.*, 49, 52, 54, 72, 73, 124, 125, 129).

(*e.*) That Judge Soto seized some land belonging to the company and put up reduction works on it (*ib.*, 123, 4thly; 278, 279.)

(*f.*) That the company's superintendent was unlawfully imprisoned in January, 1868, and after appealing in vain to higher authority for protection and redress was forced to abandon the property late in February or early in March, 1868 (*ib.*, 31, 48, 61, 68, 69, 70, 83, 87, 119, 120, 128, 129, 152, 154, 155, 156, 655, 656, 712, 713).

(*g.*) That the local officials afterwards asserted that they had driven the company away and would never let it return (*ib.*, 49, 50, 57, 58, 69, 70, 73, 74, 84).

(*h.*) That Judge Soto moved with his family into the company's hacienda and took possession of its property when Exall left (*ib.*, 51, 52, 165, 179, 185).

THE NEW EVIDENCE.

How the evidence before the commission is affected by the evidence taken subsequently. This subsequent evidence embraces:

(*a.*) The company's letter-press copy book (198–282).

(*b.*) Eight (8) letters from D. J. Garth, the company's treasurer, in New York, to Charles H. Exall, the company's superintendent, at Tayoltita, dated, respectively, May 10, May 20, May 30, June 10, July 10, July 20, August 10, October 10, 1867 (282–286).

(*c.*) Five (5) letters from Exall to Granger dated, respectively, Mazatlan, March 15, 1868; San Francisco, April 7, 1868; New York, May 8, 1868; New York, June 15, 1868; Richmond, July 18, 1868 (286–290).

(*d.*) Depositions of J. F. and Trinidad Gamboa and J. M. Loaiza, taken *ex parte* by the Mexican government at Noria, June 15, 1877, and at San Ignacio, June 5, 1877 (290–295).

(*e.*) Depositions of Frederick Sundell, taken *ex parte* by the Mexican government at Mazatlan, August 9, 1877 (296–303).

(*f.*) Depositions of Quiroz, Gutierez, Gurrola, and Delgado, with certified copy of letter of C. B. Dahlgren to Quiroz, taken *ex parte* by the Mexican government at San Dimas, May 30, 1877 (304–307).

(*g.*) Annual reports of La Abra Silver Mining Company, made under the laws of the State of New York, for 1866, 1867, 1868, and 1877 (307–310).

(*h.*) Testimony taken by a subcommittee of the Senate Committee on Foreign Relations, as contained in Report No. 2705, Senate, 50th Congress, 2d session.

(*i.*) Testimony taken in this case (461–749), with exhibits, including the opinion of the Mexican commissioner, Señor Zamacona (382–406), the argument of the Mexican agent, Señor Avila (407–422), extracts from the company's blotter book (750–752), other extracts from the company's books (753), and the "Slaughter pamphlet" (754–802).

On the question how the case, as it stood on the evidence before the commission, is affected by the evidence subsequently taken, Mr. Chief Justice Nott made the following statement in his dissenting opinion (843, 844):

"Referring now to the umpire's determination of the preliminary question of governmental liability, it must be conceded that at least one of the witnesses is shown to have been unworthy of belief, except so far as his testimony was corroborated by others, and that many of the alleged grievances were greatly, if not grossly, exaggerated.

"*But the evidence now before the court still leaves a number of facts established as completely as they were supposed to be established by the umpire.* The company did exist; it was formed by reputable business men for legitimate business purposes. There was no fraudulent design *ab initio*. They invested a large amount of money in the venture; they bought these mines in Mexico; they transported to them costly mining machinery; they carried on through the designated years an actual mining business.

"As regards the Mexican authorities, *there are other things which also remain equally certain.* The written orders of Soto, Mora and Valdespino, which were the only positive, uncontroverted evidence before the umpire of the interference of the Mexican officials and the evidence upon which he manifestly relied, *remain as well established now as they were then.* The superintendent was arrested and imprisoned. (The cause of his imprisonment may have been the personal indignation of the magistrate, as contended by the complainants, but nevertheless their witnesses show that the quarrel, if it was a quarrel, sprang out of the superintendent's perfectly proper management of the company's property in his custody.) Mule trains were stopped; military exactions were made; the civil authorities did interfere with the company's management of its own mines; the company did finally abandon the property.

"With these facts still in the record it cannot be said that upon this, the main issue in the case, the umpire would certainly have come to a different conclusion. A judgment is not to be set aside because one witness is shown to have been mistaken or to be unworthy of belief or to have sworn falsely if there be evidence enough remaining to sustain the verdict. We may now be satisfied that the witness Granger, an important witness for the claimants, was utterly unworthy of belief and much of his testimony false. But he stood contradicted and impeached by himself before the umpire. His subsequent testimony had been taken by the Mexican government in the form of four affidavits at different times

and was in the case. Nevertheless the umpire made his award."

(*a.*) The company's letter-press copy book is the most important part of the new evidence. The Court of Claims found that by due diligence it could have been produced at the original trial before the commission (841). It was in possession of Granger, who had been employed as book-keeper by the company at Tayoltita, six of whose depositions were before the commission—two for the company and four for the Mexican government. He produced this letter book in December, 1877, with other books and papers, some two years after the award, under an agreement with the Mexican government by which he was to receive $3,500 in case Mexico should be entirely exonerated from payment of the amount awarded to the company by the umpire (574, 575, 590, 591).

On this point Mr. Chief Justice Nott said (848):

"Furthermore it appears from the evidence now before us that the Mexican government agreed to pay Granger $3,500 in consideration of his producing evidence which should lead to the setting aside of the international award. Granger thereby became jointly interested with Mexico in the result and as much interested in spoliating and withholding records as if the proceedings were an individual suit on his own behalf to recover $3,500. Furthermore, it appears he was an unscrupulous character, who changed his testimony to suit his employers, and who produced from the archives of the company papers on one day for the one party and on another day for the other. Furthermore, it appears that he was an accomplished book-keeper and a man of unusual ability. Finally, it appears that he had been the book-keeper and accountant of this same company, familiar with all of its transactions in Mexico, and with all of its litigation before the international commission, and that he knew precisely what to produce and what to withhold.

"The government of Mexico undoubtedly has produced all of the books and papers which it received from Granger, and in the condition in which they came to its possession. But they, with the other books and papers of the company, were for ten years in the possession of Granger. He was

not subjected to examination and cross-examination in regard to them; they came from him in a mutilated and incomplete condition; he had a direct personal interest in producing those which would make for the complainant's case and in suppressing those which would be adverse to it. *Omnia præsumuntur contra spoliatorem.*"

This book has the usual form for an alphabetical index, but it is not indexed. Nearly all the letters from the company's superintendents in Mexico to the home office were written and copied on separate sheets of tissue paper at the port of Mazatlan, distant about 150 miles from the mines, and these loose sheets were taken back to Tayoltita, where they were pasted in the copy book (480, 516, question 252).

The first letter copied in the book is dated January 10, 1866. Much of the copy is illegible and it is omitted entirely from the printed transcript. Two other copies, pages 67 and 137, are so illegible that they have not been printed in Exhibit B.

As already stated, the first letter in the book is dated January 10, 1866, six or seven months after the operations of the company began, during which its trains were detained *en route*, as appears from Echeguren's testimony (104, answer to question 9th).

Many important letters favorable to the company have either never been inserted in the book or have been abstracted from it. Among the missing copies of letters known to have been written are those of May and June, 1866, from De Lagnel to Garth, notifying him of two drafts, each for $15,000 gold (494, 504, 606, 702), and another from the same to the same, giving an account of an assay of the company's ores made at La Puerta, the results of which were so favorable as to cause great elation (484, 486, 496, 497, 514, 516, 607, 608, 703).

Another very important letter, written by Exall to Garth June 11, 1867, just after the orders of Mora and Soto of June 3, 4, and 5, is missing. Garth acknowledged its receipt in

his letter of August 10, 1867 (286, top of page). This missing letter doubtless gave a full account of the interference of the local magistrates with the company's work and their threats of ejectment. It was written at Mazatlan, and the usual practice, as already stated, was to copy these letters on separate sheets and paste them into the copy book at Tayoltita (516). If a copy of this letter was so pasted in it was subsequently abstracted. There is a strip of mucilage with a roughened surface from which the missing copy might have been removed. A speck of paper attached to the mucilaginous surface indicates such removal. Page 154 has been entirely removed. Letters from De Lagnel to Garth, which were sent by a carrier, who died from snake bite between Tayoltita and Mazatlan, do not appear in the copy book, although written at Tayoltita (495, 507), nor does De Lagnel's report of the "armed demonstration" of the company's Mexican miners against the company appear in the letter book, although he testified that he "should take it for granted" that he reported it to the home office (513).

A letter written by Exall to Del Valle November 26, 1867, asking his help against the local magistrate (Soto), who had seized the company's Gaudalupe hacienda, does not appear in the letter book, although referred to in a later letter (December 5, 1867) from the same to the same, as follows (279):

"I take the opportunity of our mutual friend, J. G. Rice, Esq., going to Durango, to write to you *again* in case my letter of the 26th Nov'r., should not have reached you."

Then comes a statement of the serious consequences to the company if Soto should be allowed to retain possession of the premises and complete the "tahonas" he had commenced to put up (279). This letter of November 26th does not appear in the copy book.

All the missing letters that have been identified are favorable to the company, and the copies of all of those which

were written at Mazatlan, having been pasted in on separate sheets, could have been removed without breaking the continuity of the paging, for the inserted sheets are not paged.

Granger, who had possession or control of the book from March, 1868, till December 25, 1877, when he delivered it to Señor Gaona (576), had a motive to remove whatever was favorable to the company. But whether these copies were abstracted from the book or never inserted in it, it is none the less imperfect and misleading. On this point Mr. Chief Justice Nott observed (844):

"As to the action of the Secretary of State upon the same question (of Mexico's liability) in 1879, it is sufficient to say that substantially everything which is in the case now was before him then. That is to say, the letter book of the company's agents and the letters of the treasurer in New York were before him; and they were then untainted by the suspicion of *having been tampered with or of being imperfect or incomplete.*"

Again (847):

"Intrinsic and extrinsic evidence shows that the letter book was incomplete. That is to say, internally there are marks of mutilation, and the correspondence shows that letters were written and received and answered which do not appear to be in the book; and these missing letters coincide more or less with the mutilations in the book.

"The same thing is true of the letters from Garth in New York to Exall in Tayoltita. That is to say, it is manifest that these are not all of the letters which Garth wrote and which Exall received.

"The books of account are also incomplete. The most important, the journal, is but a fragment of the entire book, while the other books of the same age and manufacture, and left in the same custody, are in good order. The ore book showing by daily record the quantities of ore excavated is not produced or accounted for.

"It appears that all the books and papers of the company were left in the possession of and under the control of James

Granger* at the company's offices in Tayoltita, by Exall, the superintendent, when he left the mines in 1868. When the government of Mexico produced the letter book and letters of Garth and Exall in 1878, no evidence was given to account for them to show the condition in which they were when received, to show in whose custody they had been, to explain why they had not been brought before the International commission."

Some of the letters in the copy book are marked "Not sent," and some others, addressed to Garth, he has no recollection of ever receiving (706, 729, 733). It is clear that Granger's letter of November 8, 1867, informing Garth of a report that Exall had been waylaid and robbed on his way to Durango with silver, could not have been sent, for Exall had returned in safety by the 10th to Tayoltita, and he wrote to Garth from Mazatlan on the 17th by the steamer on which Granger's letter of the 8th would have gone. Exall would not have been likely to let such a letter as that go, and Garth would have been sure to remember its receipt if he had ever received it. He testified that he had no recollection of receiving it (Sen. Rep., 2705, p. 131).

The Court of Claims agreed with Mr. Chief Justice Nott that the letter book was incomplete, but nevertheless, and notwithstanding the authorities cited (821, 822) and its own conclusion that by due diligence the book could have been produced at the original trial, admitted it for the purpose

* In August, 1868, five months after Exall left Tayoltita, Granger had possession of the letter book and copied in it his letter of the 12th of that month to the tax collector (282), written within five days after his pretended extension of the lease of the company's lower hacienda to his father-in-law, the local magistrate, Soto (132), who had illegally seized the same property in the previous October (278, 279), and who took possession of the company's chief hacienda after Exall's departure, and was still living there with his family and working the company's mines in 1870 (52, answer 4; 165, answer 17; 179, 185). As to Granger's relations to Soto and the purpose of the letter to the tax collector, see Brief, pages 195, 196.

of showing the general situation for two years and more at the mines. The court says (825):

"The fact that some letters may be missing does not destroy the legal effect of others which appear in the book and which are shown to be the letters of the person purporting to have written them. * * * The letters are introduced and admitted upon the theory that they are representations or admissions of the company. The rule is as to admissions that the whole admission is to be taken together, and the whole must be considered in determining its effect, but letters written at different times and complete in themselves cannot be considered as a continuous admission the force of which is destroyed by the omission of part."

As the letter book has so much in it that substantiates the company's claim and justifies the umpire's award, we shall spend no further time in arguing against its admissibility, and shall content ourselves with showing by three examples that "the omission of part" *does* destroy its force "as a continuous admission." We contended below that the letter book containing statements by way of narrative from the company's superintendents to the home office could not be considered as admissions at all, and so the authorities cited and the learned chief justice seemed to hold; but, waiving this point, it is clear that the omission of Colonel De Lagnel's letter of May, 1866, notifying Mr. Garth of the draft for $15,000, makes the letter book misleading on the material point of the company's expenditures, and this omission did, in fact, mislead the Mexican agent, General Slaughter, who accordingly, in his so-called "petition" to Congress, stated the amount of Colonel De Lagnel's drafts incorrectly (774). The omission of Colonel De Lagnel's report of the assay of the company's ores at La Puerta makes the letter book defective and misleading in respect of the evidence which the company had in regard to the value of its mines, and the omission of his report of "the armed demonstration" prevents the letter book from showing, as it otherwise would show,

the hostility of the Mexican miners and their readiness, in the earlier part of the company's operations, to use force and violence against its officers. These illustrations could be greatly multiplied, but it is not considered necessary to go into further particulars on this point.

The last letter in the copy book from Exall to the home office, prior to his departure, is dated January 24, 1868. Now, what happened to him, as shown by the evidence, after that date? He had been released from his imprisonment in the pest-house about two weeks previously. But he was subsequently summoned by Perez—the same judge who had imprisoned him—and was berated and threatened at the court-room in the presence of the Mexican laborers, as testified by Granger (48):

"A few weeks after this occurrence (the imprisonment in the pest-house) on a Saturday, the superintendent Exall received from said Judge Perez an order directing him to attend at his 'juez-gado' (court-room) and the same evening at seven (7) o'clock Mr. Exall in obedience to said order went to the court-room, where he found assembled a large number of the employés of La Abra Company's mines, and others, and in their presence the said judge proceeded to lecture said Exall upon the manner in which the business of the said company should be carried on, and he threatened that if the superintendent or company did not work in the mode and manner to please the authorities, they should be deprived of their property and forced to flee the country; *all of which was said in my hearing.*"

A meeting of that kind was of course notorious, and probably for that reason the Mexican government never attempted to disprove this part of Granger's testimony, although Perez himself was accessible and could have been examined. Among the company's workmen was Matias Avalos, who testified (52, answer to question 6) that he had "heard Nicanor Perez, juez conciliador, say he would drive the company out of Tayoltita and out of the country." Cryder also testified (69) that he heard Perez say "he would

run that La Abra Silver Mining Company out of Mexico. * * * This was in February, 1868. *I afterwards told Mr. Exall of the threats of the juez.*"

Cryder testified further (69, foot of page):

"I also heard Macario Olvera, the prefect of the district of San Dimas at that time, February or March, 1868, say that La Abra Company could not stay in that district; that it would be impossible for them to do so."

Cryder then mentions the threats that were made, and adds (70):

"My suspicions were at once aroused that Superintendent Exall might be in great danger and that other 'accidents' might happen, and *I told Mr. Exall* the first time I saw him after this conversation I have related with said prefect."

As to Olvera's relations with Soto and their hostility and threats against the company, Loaiza testified (73):

"He (Olvera) was a great friend of Judge Soto, and I have heard him tell Olvera, the prefect, that they would never allow the Abra * * * Company to renew their mining operations in the district."

This animosity of the local officials was so notorious and the proof of it before the commission so conclusive that the Mexican authorities, when they imprisoned Loaiza and extorted a deposition from him a year or more after the commission had adjourned (although they could have re-examined him at any time during the five years the commission was in session after his original deposition was taken), did not question him on this point at all. The finding of the umpire on this point is of the most positive kind (8).

Exall, being thus in fear of his life, appealed to the authorities at Durango. This was shortly before he left Tayoltita. The fact of this appeal was proved by the Mexican government in its second examination of Granger, who, after testifying to Exall's imprisonment, said (119):

"That he is aware that he presented himself before the civil authorities of Durango, but does not know what answer he might have received."

Although Granger had gone over to the Mexican side, he stuck to the fact of Exall's imprisonment and appeal, and in his third examination by Mexico he said (129):

"That *he knew* the superintendent had complained to the governor of Durango, but that he does not know with what result."

Now, there is an entry in one of the company's books (the books which were withheld by the Mexican government from 1878 until it was compelled to produce them in this case) showing "expenses to *Durango*," under date of *February 21, 1868*, "$16.00" (94).

Thus this new evidence by suggesting Exall's presence in Durango shortly before he abandoned the company's property and business at Tayoltita, corroborates the testimony before the commission to the effect that he had appealed for protection to the governor.

The letter copied in the book next after that of January 24 is Exall's famous "autograph" of February 26, 1868, on which so much reliance has been placed by the Mexican government; but, waiving for the moment Exall's explanation of the circumstances under which it was written, what is there in it incompatible with the idea that having again failed in his efforts to obtain protection or redress, and being in fear of his liberty and his life, he determined to abandon the enterprise and return to New York?

He says to Granger in that letter (281):

"As circumstances are of such a nature as to *compel* me to leave for San Francisco and probably for New York to inquire into the intentions of this company, I place in your hands the care and charge of the affairs of the La Abra S. M. Co., together with its property."

What were the circumstances that *compelled* him to leave for *San Francisco and probably for New York?* It is evident, from his letter of March 15, 1868, written to Granger at Mazatlan (322, 323), that he did not leave Tayoltita on February 26. In his explanatory affidavit of May 1, 1878, he says (670):

"I reconsidered my decision to go at that time and concluded that I ought to remain longer before going and await still more alarming indications from the people and authorities, and the paper I have referred to was never delivered to Granger. Whether I destroyed it or left it among the loose and discarded papers at the hacienda of the company I do not remember. I remained there some time afterward, but I waited too long and the explosion which I believed to be several months distant, came unexpectedly and the expulsion of the company and my abrupt departure to save myself from personal harm, and the complete abandonment of everything belonging to the company took place as I have stated in my depositions."

The fact that he was in fear of his life from causes for which the Mexican government was responsible, operating shortly before and up to the time of his departure, did not depend on his own testimony before the commission, but was proved to the satisfaction of the United States commissioner and the umpire by other witnesses, who are not only unimpeached, but corroborated by the new evidence in the case. On his return to New York he told Garth and Ely why he had come home and why he had abandoned the company's property at Tayoltita, as appears from their testimony in this suit. Mr. Ely, the original attorney of the company in New York, whose deposition as to its organization was before the commission (174–176), testified in this suit as to Exall's statement to him of the reasons why he left Tayoltita as follows (655, 656):

"In May, 1868, Mr. Exall came to my office in the city of New York. After shaking hands with him I said I was surprised to see him here; that I supposed he was in Mexico

making silver bricks for La Abra Company, and he stated that he had been compelled to skip out between two days. I think that is the very expression he used, 'skip out between two days.' And I remarked, 'I hoped he had not been committing any crime down there, and had to leave the country in that way.' He said he got alarmed for his personal safety, and was fearful of what might happen to him, and he went out in that way as the safest way to go. I asked him what was the danger, what was the trouble. Well, his reply was 'that the local authorities down there were a very bad lot; that they were arbitrary, and if they got down on a man they would do about what they liked with him, and there was not much, if any, chance for redress.'"

The entire statement as made by Mr. Exall to Mr. Ely, from which this is taken, and the circumstances under which it was made, should be carefully considered.

Mr. Garth, who is a man of the highest character and exceedingly careful of what he says, said, referring to Exall's return (706):

"He came into my office unexpectedly to me, and stated that he had been so interfered with by the officers or magistrates that he was unable to conduct business, and that he had himself been imprisoned, and he said to me that he was imprisoned for about two weeks, and that he feared for his life. He was afraid of his being assassinated, or being killed, and that he had to leave. That was the substance of his statement to me."

For Mr. Garth's further statements in his direct and cross examination on this point, and on the reasons why somebody else was not sent down to Tayoltita to look after the company's property, see Record, 708, 712, 725, 726.

This corroborates Exall's statement in his first deposition for the company (32):

"Question number nine. Why was nothing further done by you and by said company?

"Ans. Because I did not dare to return and resume mining operations there. I was and am satisfied that I could not do so with safety to the life of myself or my workmen, or with safety to the property of said company. Such was the hostile feeling or prejudice against said company as citizens of the United States, and further prosecution by said company of mining operations there, both on the part of the citizens and the local and national authorities of the Mexican Republic, and the violent acts resulting from that feeling and prejudice, being encouraged and connived at by said authorities, as I have stated. And I returned to the State of New York, and advised said company that it was useless to attempt any further working of said mines, and gave them the facts above stated as my reason for that advice; and I understand that said company was so advised by others who were citizens of Mexico."

In his letter of March 15, written at Mazatlan, to Granger, Exall said:

"I wrote you by Rice and said *everything I thought necessary.*"

Why did not Granger produce that letter? He produced the five others which Exall wrote to him after his departure. *Omnia presumuntur contra spoliatorem.*

It is clear that Granger did not regard Exall's letter of February 26 as authority to him to represent the company. He used the letter for his own and Soto's purposes, but he never wrote a line to the company or received a line from them. If he had not been in the plot with the local officials, he would have corresponded with the company and copied his letters in the letter book. He would also have produced letters from the company, if he had received any, showing his authority to act for them, for this would have been fatal to the company's case and would have assured him the promised reward.

(*b.*) Another sign that Granger tampered with the books and papers of the company before delivering them to the Mexican government is the fact that Garth's letter of September 30,

1867, to which he refers in his letter of October 10, to Exall, is missing. This must have been in reply to Exall's of July 13 and 14, in which he had informed Garth that the officials were getting daily more troublesome, and that their demands were all foolish and unjust (272).

In his letter of October 10 to Exall, Garth says:

"Since *ours of 30th September* we have yours of 5th August from Mazatlan" (286).

In his letter of August 10 Garth acknowledges Exall's of June 11, the one that is not found in the copy book.

It is clear that Garth's missing letter of September 30 was written in reply to Exall's of July 13 and 14, and must have taken notice of Exall's complaint of the Mexican officials. The court seems to have overlooked the reference in Garth's letter of October 10 to his letter of September 30, and to have assumed, as the chairman of the Senate subcommittee did, that Garth had not written to Exall between August 10 and October 10. The chairman said in examining Garth:

"You let the matter rest until the 10th of October before you wrote any more."

And again:

"Did you feel any uneasiness about your property out there between the 10th of August and the 10th of October (Senate Report No. 2705, p. 164)?"

The court alludes to this as follows (828):

"On page 164 of that examination, in answer to a question by the chairman of the committee, Garth said in substance that he did not recollect of having written to Exall between the 10th of August and the 10th of October, 1867."

Of course, Garth could not recollect positively, after a lapse of over twenty years, that he had written to Exall between these two dates, and as the letter of September 30 had

not been produced by Granger, it looked as if Garth had not written to Exall during all that time. But if the chairman or the court had observed the opening sentence of Garth's letter of October 10 they would have seen that he had written to Exall on September 30, and all of their theories based on the contrary assumption would have been overthrown. So dangerous is it to assail an award on such assumptions after such a lapse of time. It appears from Exall's letter of November 17 that he received Garth's letter of September 30 (276).

Judging by the number and dates of Garth's earlier letters to Exall, there were probably other letters of Garth's to Exall between August 10 and October 10, which were withheld by Granger because they followed up the subject of the letter of August 10, and dealt with the interferences of the officials and the want of protection at the mines. In any event, this new evidence—Garth's letter of August 10, written, as it shows on its face, after the receipt of Exall's of June 11—proves that the company had heard that Americans and other foreigners would not be protected in their persons and rights in Mexico, and that the company might be compelled to abandon its property; furthermore, that, in view of the situation, Garth instructed Exall "to take all necessary and legal measures by protest and otherwise to secure our claim against the Government." Garth adds:

"Mr. Rice, no doubt, will be of essential service to you in any measure of this sort, and we would advise you to consult freely with him" (286).

This new evidence, produced by Mexico, confirms that part of Chavarria's testimony before the commission in which he said that he had been "employed by Mr. Rice, of California, as Exall's lawyer," and as such had "repeatedly solicited from the State government protection for the Abra Company to suppress the robberies and outrages which the

company were experiencing at Tayoltita, but all to no purpose," etc., etc. (83). With that letter in evidence, written months before the abandonment and nearly three years before the company's claim was presented to the international commission, Chavarria's testimony, which the umpire regarded as vital to the case,* is corroborated in the most significant and conclusive manner; and so is Exall's as to his employment of Chavarria (158).

(*c.*) Exall's letters written to Granger after the abandonment, to which reference has already been made, were excluded by the court. They do not show that the company exercised any acts of ownership after Exall's return to New York or had any information from him that he had left Granger in charge; and, as already observed, they demonstrate the falsity of Granger's letter of August 12 to the tax collector on which the complainant has relied to prove that the company was still in possession at that time.

(*d.*) The depositions of Loaiza and the Gamboa Brothers are inconsistent and show nothing with certainty, except the nefariousness of the methods by which Mexico has sought to impeach the award (Brief, 209–216).

(*e.*) Sundell's depositions and testimony are reviewed in the Brief, 221–249, where the points in which it strengthens the testimony for the company are stated.

(*f.*) These depositions were taken *ex parte* at San Dimas by the Mexican government May 30, 1877, to show that Judge Quiroz did not give Captain Dahlgren permission to remove a portion of the company's machinery, as stated in the captain's deposition for the company. Copies of Dahlgren's petition and the judge's order are produced, the latter

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* Referring to Chavarria's testimony, the umpire said in rendering his award (8):

"It appears that the superintendent of the mines took such steps as he could to obtain protection from these authorities (at Tayoltita and San Dimas) and finding his efforts in vain he appealed through a lawyer of high standing to the highest authorities in the State who declined to interfere in the matter."

of which shows that Dahlgren was not forbidden to take what he wanted, but was simply told that if he took it, it would be "under his own responsibility."

Guitierez, Gurrola, and Delgado deposed that Granger disposed of certain articles belonging to the company, and that Dahlgren carried off parts of the machinery from the company's mill without permission after Exall had left Tayoltita.

This in no way affects the testimony for the company before the commission.

(*g*.) All of these annual reports, except 1877, were on file and accessible while the commission was in session, and they all corroborate the testimony for the company at the original trial. (See Baldwin's examination on this subject in this suit, 678–680; also Ely's, 653, 654.)

(*h*.) The testimony taken by the Senate subcommittee in 1889 was very favorable to the company. It is summarized in Senator Brown's minority report, in the conclusion of which—that La Abra award should stand and be executed in full faith—the chairman of the committee (Senator Sherman) concurred (452, 453). Extracts from this testimony and Senator Brown's report are printed in the appendix to the Brief, XXVIII–LXXIII.

One of the most remarkable things brought out in the Senate investigation was the fact that Mexico had concealed its possession of the company's books and papers from its own attorneys so that General Foster and Mr. Lines were able to assure the sub-committee that they could not get them and did not know anything about them (Senate report No. 2705, pp. 47, 48, 66; see also Brief, p. 15, note).

Another remarkable fact was developed by the Mexican government in Elder's testimony to the effect that the richest of his ores at his mine, near the company's, were stolen, and that the local magistrate did not dare, on peril of his safety, to interfere for Mr. Elder's protection (Sen. Rep. No. 2705, p. 568, 569).

This same witness also testified that when subsequently he was in the company's employ the local magistrates insisted that the company should give employment to more of the unemployed workmen (*ibid.*, 565, 566), and that he was frequently taken at the point of the bayonet from the company's mill, when it was running, to act as interpreter a mile away (*ibid*, 598).

The substantial truthfulness of Dahlgren's original deposition for the company and the falsity of his subsequent testimony on behalf of Mexico were proved by a Mexican (Danglada) who corroborated ex-United States Consul Sisson (Brief, appendix III, p. XL).

One of Mexico's most serious charges against the company was completely disproved by Elder, who had been summoned to prove it by the Mexican government (*ibid.*, appendix V, pp. LVIII, LIX).

(*i.*) The testimony taken in this suit on behalf of the complainant in no way impeaches or weakens the evidence on which the United States commissioner and the umpire relied in allowing the company's claim.

De Laguel proves the defective character of the letter book, the hostility of the Mexicans to the company, the pernicious character of the local magistrate, Soto, his hatred of the company, his interests hostile to it, the exaction of "double duties" by the "authorities," and the detention of the company's trains to enforce payment. (Brief, 261–279.)

Sundell's and Torres' testimony is in some important respects favorable to the company, and where it is unfavorable it is shown to be false (Brief, 221–261).

Gaona's testimony is fatal to Mexico's case, showing as it does her iniquitous contract with Granger, her acceptance from him of his selections from the company's records without any verification or explanation on his part, and her failure to prosecute her own eminent citizens, Chavarria or Galan, for perjury, although she alleged that they had perjured themselves, and she was seeking relief on that ground,

and there was no legal impediment to their prosecution (Brief, 187–193).

As to the evidence taken in this suit for the company, it may be said that it shows conclusively, not that all the statements in the company's memorial were true, but that the evidence on which the United States commissioner and the umpire relied in allowing the claim was worthy of trust. It is remarkable that after such a lapse of time so much affirmative proof could be obtained, such as Bishop Potter's and others' testimony to the high character of Mr. Collins, long since dead (675, 711, 736, 737); Mr. Cushing's original acknowledgment of the company's offer to submit its witnesses to cross-examination by him as agent for the Mexican government (653, 668); ex-United States Consul Sisson's refutation of Dahlgren, Loaiza, and Gamboa (687–689, 691, 692); Mr. Birmingham's statement of the results of tunneling Candelaria (Brief, 299, 300); and Mr. Secretary Fish's circular to the effect that the United States did not vouch for any of the claims either on the law or the facts, but left them entirely to the examination and decision of the commission (742, 743).

The case was thrice argued before the Court of Claims, once on demurrer and twice on the merits. It is clear from the opinion of the majority of the judges that they would have felt bound to dismiss the bill if they had felt free to apply the ordinary rules of law to the case, and, as it was, they did not find that the testimony of a single witness necessary to establish Mexico's liability was perjured or false or corruptly obtained. They concluded that the award must have been obtained by fraud, because the evidence showed that the company was short of funds towards the close of its operations and disappointed at the quality of its ores. But the poverty of the company was due to the want of protection—that is, it could have had all the money it needed to tunnel its mines as the Candelaria was afterwards tunneled with such wonderful success if it had not been for the arbitrary and illegal orders

of the local magistrates, Mora and Soto, and the subsequent interferences and outrages that made the company's continuance at Tayoltita impossible (732, 733).* The company's poverty does not explain the total abandonment of its buildings, machinery, and stores, nor the undisputed fact that the local Mexican magistrate who, in October, 1867, had illegally

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* In connection with a description of the intended tunnel Garth testified to the company's ability to get all the money it wanted before it was apparent that life and property were insecure at Tayoltita. What follows is from his testimony in the Senate investigation (Rep. 2705, p. 148):

"Q. Do you mean a tunnel to strike the vein lower? A. Yes; it was a plan of Weidner.

"Q. Did that apply to the La Abra alone? A. Yes; that was mainly designed, but in the cutting of this adit level, as it was called, it was designed to strike greatly below the lowest workings where the great La Abra mine had been worked.

"Q. So as to drain off the water, if there should be any, and carry out the ore instead of carrying it upon the backs of the men? A. Yes; that was the plan, and from the appearance that was shown to me that seemed to be practicable; and it would cut most of the mines, the La Luz, the El Cristo, and others, far lower down than they had been worked at all.

"By the CHAIRMAN: Q. Did Exall do any work on that tunnel? A. I don't think any of them did. *but that was the design when I left.* Bartholow expected to do so, but, as I say, the thing had cost much more money than we anticipated. It was supposed when we went into this thing that $150,000 would be all the money needed to do that thing by these estimates. *We could have raised twice as much when this thing was gone into* if it had been necessary, but particularly Mr. Bartholow was very positive that he would not want any more, and objected to our making an effort to get any more. At the time that this business was done, it was done by some friends, both of Mr. Bartholow, who were in the West, and of myself, in New York there, and the thing was honestly and fairly gone into as a business operation."

What follows is from Mr. Garth's testimony in this suit (732, 733):

"Question. Now, I want to ask you whether you would have had any trouble in raising all the money you wanted to carry on your mining operations at Tayoltita if you had received assurance that life and property were safe down there?

"Answer. I should think it would not have been a difficult matter to get the necessary funds in that event.

"Question. What effect, if any, did the statement in Exall's letters of July 13 and 14 that the officials were daily becoming more troublesome, and that their demands were foolish and unjust, have upon your efforts to raise money?

"Answer. *They had the effect of preventing any further advances in that direction.*"

seized one of the company's haciendas, remained in possession of all the company's property, and was busy with the reduction of its ores from the time of Exall's departure in March, 1868, until General Adams arrived at Tayoltita in May, 1870, to obtain testimony in support of the company's claim.

Point IV.

THE UNITED STATES HAS NOT SHOWN BY THE EVIDENCE THAT THE WHOLE "SUM" AWARDED WAS PROCURED BY FRAUD, &c.

It is not disputed that the company purchased and owned these mining properties and erected expensive machinery and engaged in working the mines.

The amount of the award was arrived at by the umpire as follows:

He determined from the evidence before him what amount the company actually expended for the purchase of the mines, machinery, &c., and stated it thus:

From subscriptions and sales of stock..... ...	$235,000 00
Lent and advanced.....	64,291 06
Salaries and expenses....	42,500 00
	$341,791 06

To that is added:

Amount derived from reduced ores.....	17,000 00
Ores extracted from the mines and deposited at the mill when the mines were abandoned.	100,000 00
Aggregate.....	$458,791 06

upon which interest was allowed by the umpire.

This makes it necessary to consider the evidence as to the several items of which the award is composed.

As to the first three of the above items, aggregating $341,791.06, the bill does not charge fraud in the sense that no expenditure was made. It charges that the amount expended was exaggerated and was much less than $200,000 (R., p. 18).

It is therefore apparent that some part of this was properly allowed.

And this remits us to the evidence to ascertain whether the United States have shown that this amount was exaggerated by fraud and to what extent.

THE AWARD CANNOT BE SET ASIDE BECAUSE THERE WAS A CONFLICT OF EVIDENCE BEFORE THE UMPIRE OR BECAUSE A CONFLICT HAS BEEN PRODUCED BY EVIDENCE ADDUCED SINCE THE AWARD WAS MADE. THE QUESTION IS WHETHER THE UMPIRE HAD BEFORE HIM SUFFICIENT EVIDENCE TO SUPPORT THE AWARD IN THIS RESPECT THAT HAS NOT NOW BEEN SHOWN TO BE PERJURED.

The duty of the umpire required him to weigh the evidence.

EVIDENCE BEFORE THE UMPIRE.

He held that the claimants should be reimbursed the amount expended.

He arrived at that amount by the testimony of George C. Collins (R., p. 38).

He adopted Collins' figures.

Alfred A. Green testified that the mines and buildings cost, probably, $300,000 (p. 37).

Sloan, a witness for Mexico (p. 120), testified that the company had expended $303,000.

Granger (p. 119), called for Mexico, testified that company had expended $303,000.

Difference between gold and currency. Brief, pp. 356, 357.

For the facts as to item 4, $17,000, and item 5, $100,000, see Brief, pp. 72–75, 76–79.

Therefore, as to these items, there is not now evidence to show that the umpire was misled by perjured testimony.

Conclusion.

(1.) In this suit there is an attempt to review and reverse the action of the President in a matter of international concern exclusively within his control.

Mexico's *liability* to La Abra Company was decided, after full investigation, by President Hayes (Brief, pp. 50–60). This decision is not examinable by the courts. It is conclusive on both the legislative and the judicial branch of the Government (Brief, p. 64 *et seq.*).

(2.) The award of the umpire must be sustained, because under the treaty it was final and conclusive, and its integrity cannot be inquired into collaterally. The complainant below admits that this award was beyond the powers of the court's decree, and the Court of Claims only found itself at liberty to pass judgment upon the award when it brushed aside the rules applicable to equity suits (Brief, pp. 87–92).

(3.) The Court of Claims found that the Mexican government could, by the exercise of due diligence, have obtained and produced before the International Commission the evidence which it secured after its adjournment (R., pp. 841, 847, 848), but though it was required by the act "in *all* respects to proceed in said cause according to law," it held that the question of Mexico's diligence was not before it.

Though reasonable diligence must appear before a court of equity lends its aid to a complainant, the Court of Claims excused it in this suit because, as it held, Congress by the act of 1892 had waived the necessity of such proof. Thus the company was brought *in invitum* into a judicial forum at the suit of its government, which, suing for the use of

Mexico, was relieved of a duty that equity inexorably demands of litigants (R., p. 818; Brief, p. 113).

As the new evidence could have been obtained by due diligence during the original trial, the bill of the government should be dismissed (Brief, pp. 114, 115).

(4.) The alleged newly discovered evidence relates solely to issues passed upon by the International Commission in examining the company's claim.

This was admitted below (Brief, p. 127).

The question of fraud in procuring evidence and the question as to the cause of the abandonment of the company's property in Mexico were pressed upon the attention of the commissioners, and the controversies thereon, with all the evidence, arguments, and opinions, went to the umpire, who rendered a deliberate decision thereon (Brief, pp. 128, 129).

This court will not set aside this judgment for any matter "which was actually presented and considered" in the judgment itself. "In the exercise of equity powers" the Court of Claims ought to have applied the rules of chancery to this merely cumulative evidence relating to a disputed matter already actually presented to and considered by a competent tribunal, and have dismissed the bill, for it held, and properly held, that Mexico was the real plaintiff in this proceeding (Brief, pp. 130–137). There is no pretense that the kind of fraud for which equity will grant relief against a judgment has been proved or even intimated in this case.

(5.) The bill in this suit seeks to deprive this company of its right of property in the umpire's award, which this Government by treaty stipulation, having the force of law, had agreed to consider conclusive, and to which by the same instrument it had declared it would give "full effect."

The Government of the United States received this award from Mexico in trust for this company, whose exclusive property it was. To dispose of it directly by act of Congress or to subject it to judicial disposition by means of statutory

directions impairs a vested right. This legislative interference cannot be tolerated by this court. Both parties to the arbitration "surrendered to a common arbiter, without reserve, their entire jurisdiction in the premises" (Brief, p. 151), and except by their joint act and for good cause the award cannot be disturbed (Brief, pp. 138–179).

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